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No. 97-1704

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SUPREME COURT, U.S.

In the

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX
VOLUME I
(Pp. 1 – 374)

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PETITION FOR CERTIORARI FILED APRIL 17, 1998
CERTIORARI GRANTED JUNE 22, 1998

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381 PP

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

ESTEBAN YANEZ ORTIZ, EDEE COCHRAN,
LESTER E. TAYLOR,
JOHN ALLGOOD AND HENRY EVERS

Intervenors-Appellants,

v.

GERALD AHEARN, et al.,

Appellees.

No. 95-40635

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
January 27, 1998	Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit on Remand
December 3, 1996	Order Denying Application for Panel Rehearing of the United States Court of Appeals for the Fifth Circuit

November 26, 1996	Order Denying Suggestion for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit
July 26, 1996	Opinion and Order of the United States Court of Appeals for the Fifth Circuit

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP and JAMES ELLISON, on Behalf of Themselves and Others Similarly Situated,
Plaintiffs,
v.
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION,
Defendant,

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY,
Defendants- Intervenors

OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated PENN MUTUAL LIFE INSURANCE COMPANY and PLANT INSULATION COMPANY

Additional Counterclaim Defendants.

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY,
Plaintiffs,
v.

DANIEL HERMAN RUDD, JR., BEVERLY WHITE and JOHN HANSEL, on Behalf of Themselves and Others Similarly Situated,
-and-
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, and PENN MUTUAL LIFE INSURANCE COMPANY,
Defendants

C.A. No. 6:93 CV 526 // C.A. No. 6:94 CV 458

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
August 29, 1995	Judgment on Attorney's Fees of the United States District Court for the Eastern District of Texas
July 27, 1995	Memorandum Opinion of the United States District Court for the Eastern District of Texas
July 27, 1995	Judgment Regarding Class Certification of the United States District Court for the Eastern District of Texas
September 9, 1993	Order Provisionally Certifying Class for Settlement Purposes of the United states District Court for the Eastern District of Texas
September 9, 1993	Class Action Complaint

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FIBREBOARD CORPORATION

VS.

CONTINENTAL CASUALTY COMPANY

Docket No. 6:93cvil
Tyler, Texas

TRANSCRIPT OF SETTLEMENT HEARING
BEFORE THE HONORABLE ROBERT M. PARKER, CHIEF
JUDGE FOR THE EASTERN DISTRICT OF TEXAS

(list of appearances omitted)

PROCEEDINGS
August 27, 1993
4:30 p.m.

THE COURT: Be seated.

Do you have an announcement now, gentlemen?

MR. RICE: Your honor, Joe Rice on behalf of the court-appointed negotiating committee. Your Honor, we have been working basically around the clock with CNA and Fibreboard Corporation and lately with Pacific Indemnity trying to come to essential terms on a proposed settlement agreement that we would subsequently get in form and present to the Court.

I think the intent today is to try to announce to the Court the significant terms of an agreement that we believe will be reduced to writing in a short period of time at which time we would present it formally to the Court. I think maybe the easiest way to do that, if the Court is -- it is agreeable to the Court is just I will try to go through the essential terms and then when I finish if I leave something out, I'm sure there is enough people here to supplement it as we go forward.

As the Court has requested, we are dealing with a futures action only. Let me get to the microphone so I can get on the record. The agreement is that Pacific Indemnity and CNA, on behalf of Fibreboard would pay into a settlement vehicle trust that would be created, the cash equivalent of $1,525,000,000 plus interest at the 90-day T-bill rate as of today with that deposit to be made no later than January 1, 1994 in a lump sum payment at that time.

They have the option of paying it earlier if they wish, but that is the latest date they can make the deposit into an agreed-to account. The interest drawn on the money thereafter would belong to the trust or the -- upon final approval.

In addition, there are a group of unsettled present cases that will be identified, and there is a budgeted amount that will be finalized. It is not quite yet finalized. To the extent that budgeted amount is not needed to resolve that group of unsettled present cases, 80 percent of the amount remaining would then be transferred free and clear to the trust. The trust would then be responsible for complete defense litigation handling of the future cases that would have legal claims for personal injury, asbestos-related injuries as to Fibreboard.

There are two groups of cases that collectively refer to one group as green card cases. In presenting the final definitions to the Court, the green card cases will be defined in such a fashion

to be considered future cases, green card being a case that took a dismissal without prejudice against the Fibreboard Corporation on a previously filed suit and has the right to come back upon subsequent development of a non-malignant disease process of certain severity or a malignancy. Those would be cases the trust would be responsible for.

As to cases that have previously filed claims against Fibreboard but who received a cancer waiver only, either by settlement with cash payment or by some other negotiated value but their only right is to return for a malignancy claim, those claims would be considered presents and would remain the responsibility of the Fibreboard Corporation and their insureds under any agreements they would have, but they would not be the responsibility of the settlement trust.

In addition, the Fibreboard Corporation will make a payment of $10 million dollars at present cash equivalent, and that will be used by the trust to fund a subsequent annuity-type payment that we would present on further detail to the Court later, but it is additional payment in addition to the amount paid by CNA and Fibreboard -- excuse me CNA and Pacific Indemnity.

In addition, this will be presented to the Court as a 23(b)(1)(b) class action. This agreement will not be final until the Court has had the opportunity to review it in all of its essential terms to determine the fairness of it, to make a finding on the reasonableness of it, to review it in detail, and take whatever testimony and whatever examinations the Court deems appropriate. We want to make it clear at this time this deal is completely contingent upon Court approval and the Court's complete investigation of the deal on all issues that the Court deems appropriate.

In addition to the terms I have set forth, the Fibreboard Corporation will be responsible for the intake administration for a

period not to exceed five years. The administrative part would be basically the suits would be filed against Fibreboard Corporation. They would do the intake, put it into the computer system, and then turn to the trust the responsibility for negotiation, liquidation, or handling the cases after the global was approved.

Fibreboard, upon approval of the global corporation, will waive any attorney/client privilege, will waive any confidentiality, will waive any trade secrets, and all other essential information necessary to put the trust in the position to fully stand in the place of Fibreboard in the underlying tort litigation for subsequent claimants or members of the class that may claim injury, so that the trust would be in a position to fully understand, evaluate, and defend those actions.

Fibreboard Corporation will assign to the trust any and all claims for contribution and indemnity they have against other joint tort-feasors arising out of asbestos personal injury cases.

To the extent that this settlement or any other actions on behalf of Fibreboard Corporation or these insureds creates the availability of additional insurance funds available to the Fibreboard Corporation from companies other than CNA and Pacific Indemnity, those funds will be used solely for the purpose of which they are intended, that is, for defense and indemnity payments. Generally there will be a written agreement that further elaborates on this, and to the extent that those funds are remaining at the time that they are no longer needed by Fibreboard, any remaining funds will become property of the trust.

There is a provision under the April 9th agreement between CNA and Fibreboard that deals with a $95 million contingent payment by CNA; and that payment, to the extent not otherwise wrapped into these payments, would become property of the trust. We understand that when everything is said and done be-

tween Pacific and CNA and Fibreboard during the interim of the operation of the global while we are proceeding through this Court and if necessary through the appellate process, there may not be any of that fund left; but to the extent that it is, it is our position it becomes property of the trust if it is not already part of the value received.

Your Honor, the agreement when finally presented to the Court would require the carriers at CNA and Pacific Indemnity to fund all costs of the operation or this proceeding itself through to final resolution and the payment of class counsel attorney's fees as approved by the Court will be the additional obligation of CNA and Pacific Indemnity not to be credited against any previous monies paid or specifically not to be part of the $1,525,000,000 paid into the trust. It would be additional funds once approved by the Court.

THE COURT: The definition of future cases, the definition provided to me earlier representing, as I understand it, the agreement of the parties, is as follows: "The settlement class generally consists of all persons, who have now or may have in the future, asbestos-related injury or death claims against Fibreboard or related companies or persons except those who settle those claims or file lawsuits on those claims before August 27, 1993."

MR. RICE: Your Honor, that would be amended when we finalize it about what I said about the green cards and the cancer waivers and also it will be amended to clarify what is meant by related companies or persons. It is the Fibreboard Corporation and those that bear legal responsibility for their asbestos liability, and we will clarify that.

THE COURT: Mr. Wachtell, you rise.

MR. WACHTELL: I rise. I just want to be sure that -- I think Your honor inadvertently omitted the word "personal" when you were reading from the sheet of paper before "injury." I think it is personal injury or death claims.

THE COURT: Did I not say personal? I had intended to.

MR. WACHTELL: I think it was a slip of tongue, Your Honor.

THE COURT: You are correct.

MR. WACHTELL: I just want to be sure that there is nothing about the related companies or persons that expands what we understand we are talking about here, but I don't think we will have any difficulty with that. I have several additions just for clarification and specification to what Mr. Rice has proffered, Your Honor.

MR. RICE: I wasn't finished, but you --

MR. WACHTELL: Oh, I'm sorry, Joe.

MR. RICE: That's all right.

MR. WACHTELL: No, go ahead.

THE COURT: I thought you were through. Go ahead.

MR. RICE: Your Honor, in addition that before this global settlement was to be presented, we understand there will be presented to the Court for approval a bilateral agreement between the insureds and Fibreboard Corporation such that the integrity of this settlement will be preserved against any ruling that may come, be it adverse to one party or the other out of the California

insurance litigation. So this settlement will resolve as it relates to this fund being created, the insurance litigation. That in litigation for other reasons may have to go forward one insurer, one carrier, one other manufacturer, we don't know. But the full intent of the parties, as we understand it, is that this settlement will live beyond the outcome of the coverage litigation no matter how that litigation is resolved. And that has to be subject to Court approval, as we understand it, the bilateral as well as the global.

I think those are the essential terms --

THE COURT: You are not talking about California court approval, you are talking about this Court's approval.

MR. RICE: No, Your Honor's Court approval.

Your Honor, I believe those are the essential terms. I hope I have not left any out; and if I misstate them, I'm sure someone is going to clarify me.

THE COURT: Mr. Wachtell.

MR. WACHTELL: I think I am in accord with most of what Mr. Rice has said and where I am not, I will try to specify. I think he is accurately referring to an agreement in principal for a global settlement of all future personal injury asbestos-related claims against Fibreboard. As he indicated, this includes resolution of the coverage dispute as to these claims and --

THE COURT: Coverage dispute between CNA, Fibreboard, and Pacific.

MR. WACHTELL: That is correct, Your Honor. And as Your Honor has previously been advised, there is a agreement between Continental and Pacific with respect to sharing of the

settlement, global settlement that we are talking about, subject to Court approvals.

THE COURT: As I understood our previous conversations and the extensive negotiations, this agreement is subject to board approval.

MR. WACHTELL: This global agreement is likewise subject to board approval, Your Honor. Now to specify things that I think have been mentioned and are understood --

THE COURT: No. You and I did not communicate. This agreement, as I understood it, is subject to board approval on the Fibreboard -- I'm sorry on the CNA/Pacific agreement. If CNA and Pacific do not have board approval for that agreement earlier announced, then that is -- nullifies the global agreement.

MR. WACHTELL: That is correct. It is a condition to the --

THE COURT: Plus the global agreement is subject to board approval.

MR. WACHTELL: That is correct, as well, Your Honor.

Okay. With respect to the amounts that have been specified to be payable on this global settlement of the future claims, the obligations of Continental and Pacific are several. In other words, each will pay the amount agreed upon between them pursuant to that contract between them, and the aggregate of those amounts will be the amounts that have been agreed upon with Fibreboard and the claimants as recited.

With respect to the escrow fund that is to be created, as correctly indicated, not later than January 1 of 1994, Your Honor, the investments in that fund will be subject to joint agreement; and if there is a failure of such agreements, the default provision is that the money will be invested in treasuries of two years or less maturity.

Well, the escrow then -- the concept is the escrow is obviously subject to joint control and will follow the question of final approval of the global. If there is final approval of the global settlement, the original principal amount plus accrual -- accrued earnings thereon will flow into the settlement trust. Upon failure of such final approval, the fund principal together with earnings will revert to Pacific and Continental in their pro rata shares.

THE COURT: Now, that's not my understanding of the negotiations. It was my understanding that it would revert pursuant to the terms of the bilateral agreement.

MR. WACHTELL: I was going to come to that, Your Honor. If there is a bilateral and that is finally approved then -- I was going to refer to that.

THE COURT: Now, Mr. Wachtell, the confusion I have and I might not have understood Mr. Rice, does the interest obligation begin on -- at the time of funding which is no later than January 1, '94, or does it begin at an earlier date?

MR. WACHTELL: No, unfortunately I think he said it began today.

THE COURT: Well, I didn't hear.

MR. WACHTELL: I'm sorry, Your Honor. I'm sorry to have to say that we had to agree that it begins today.

THE COURT: All right.

MR. WACHTELL: Your Honor, the -- as has been indicated, this is -- the agreement is for a mandatory non-opt-out clause pursuant to Rule 23(b)(1)(b) of the Federal Rules of Civil Procedure, and I think it is the parties' intent to very shortly be presenting papers appropriate to Your Honor for your consideration for certification, for settlement purposes only of a preliminary certification of such class for settlement purposes.

In return for the monies that Continental and Pacific will be agreeing to pay pursuant to this global settlement, Continental and Pacific and Fibreboard are to be receiving total peace, what I term total peace. This is an all-end settlement with respect to future claims as they have been defined for Your Honor, and that include without limitation protection against and bars against any cross claims of any description whether by way of contribution or indemnity, any direct action claim that may exist under the laws of any jurisdiction, any claims by Fibreboard for indemnity defense or anything else under the sun. In other words, these amounts are buying the insurers and Fibreboard total peace with respect to any claims, direct or indirect, involving these future claimants as defined. I think that --

THE COURT: The only element that I recall that I think has not been mentioned, in the unlikely event of failure to achieve Court approval and failure to achieve approval of the -- well, or as part of the bilateral agreement, the relation of the funds to Fibreboard's benefit would include the interest.

MR. WACHTELL: Your Honor, I'm sorry. I keep on saying I am going to be referring to that. I guess I am trying to go down my notes, but if you want me to talk -- because I have a number of items on the bilateral –

THE COURT: I thought you were winding down.

MR. WACHTELL: Oh, no. I am just trying to decipher my own handwriting, Your Honor.

THE COURT: I should have known better. Go ahead.

MR. WACHTELL: I think there was reference to -- and quite correctly by Mr. Rice to the fact that Continental and Pacific have agreed to pay the reasonable fees of the Plaintiffs' negotiating committee as fixed by the Court, and that should be separate and apart from the amount agreed to be paid to the future class. I think I should note without meaning to indicate to Your Honor what, you know, is or is not an appropriate fee for Your Honor to determine upon, that our agreement is -- our obligation to pay that amount at least is not going to exceed three percent of the overall sum going into the futures class, which I think we have agreed would be the 1.525 billion plus any additional amounts pursuant to the arrangement that Mr. Rice described.

It is intended that the trust and the agreements will have pay-out provisions from the trust designed to provide pay-outs over a 45-year period and that those will be reasonably satisfactory to the insurers and to Fibreboard. It is the intention of the parties, and the parties are agreeing --

THE COURT: Well, let me interrupt you again. It is my understanding that given the arrangement negotiated for the additional contribution represented by the $10 million contribution by Fibreboard, that there is an additional 20 years in the trust -- so it is a 60-year operation.

MR. WACHTELL: Yes, I think that is accurate, Your Honor. My 45-year reference is to the pay-out and distribution

provisions with respect to the funds agreed to be provided by Continental and Pacific.

The parties have agreed to cooperate forthwith to request of the California Court of Appeals before which the appeal in the coverage cases is pending, to refrain from rendering a decision as to those issues that are unique to either Continental or Pacific on the one hand and Fibreboard on the other in that appeal.

It is also intended to be a term of the definitive agreement that upon execution of that agreement, the parties will seek a stipulated reversal in the California coverage cases of the judgment of the superior court, insofar as that judgment was adverse to Continental and Pacific. Fibreboard acquiesces in Continental's having negotiated for and entering into a futures only global settlement, as well as agrees to Continental entering into the specific global settlement that is being outlined for Your Honor today and acknowledges that this is entirely consistent with the April 9, 1993 agreement that exists between Continental and Fibreboard.

I do turn to the bilateral agreement, Your Honor, as that would be an agreement between Continental and Pacific on the one hand and Fibreboard on the other to settle any and all claims against Continental or Pacific or their respective policies with Fibreboard, and that would include direct claimants, cross-claims, claims by Fibreboard, the totality of claims that could be raised under the policy. Such a bilateral would be subject to final Court approval.

And there is, as Your Honor had indicated, a correlation between the -- that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement in what we all think is the unlikely -- well, I should not presume. In the event -- I don't want to presume on anything. In the event that the global agreement should fail final Court approval for any reason,

and my partner Mr. Rosen has the language that I think has been discussed between the parties as to the precise correlation of the consideration. Leonard.

MR. ROSEN: This is the -- one of the terms that was discussed at some length today was the question of what the cost of the bilateral might be, and the following language I think is satisfactory to both Fibreboard and Continental in terms of what the price term of the bilateral might be: The first element of it is that the -- it has to be recognized that the costs for the present settled cases and the unsettled cases are and will remain an unknown. Fibreboard will deal with them in negotiations for a bilateral to achieve a reasonable approximation of the anticipated cost to Continental of disposing of those cases under the terms of the April 9 agreement. That is one element, the present settled and the present unsettled.

The second element of price would be with respect to the future cases, and there we agree that the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it. The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the Plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount since interest is going to commence accruing today, and it is the net amount of that interest. If there are any taxes, that would come off. But the entire amount plus the net interest would be devoted to the bilateral.

And in addition, the cost of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of Plaintiffs' Counsel, the notice costs that we are agreeing to; and, in addition, there is an obligation under the April 9 agreement to pay the counsel fees of Brobeck in connection with the global. To

the extent any of those costs are saved, that could be a relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Lastly, I would mention only as to the April 9 agreement. It is contemplated that that agreement will require some modification, and that it will basically continue in effect with respect to the administration of claims. During the interim period while the global and the bilateral are going through the Court process, that will remain substantially in effect to the extent not inconsistent with the understandings that we have talked about with respect to the global and bilateral, and that will be worked out as we negotiate the details of the bilateral, which we will be doing in the next -- the near term, the next few days or weeks, Your Honor.

MR. WACHTELL: I think what Mr. Rosen has just said covers my note that -- let me just ask him because I don't want to say anything inconsistent from what he was just saying.

(Conference off the record.)

MR. WACHTELL: With respect to certain other provisions of prior agreements between the parties, Your Honor, assuming final approval of a global or bilateral agreement, there is -- there are various provisions in the March 27, 1992 agreement between Fibreboard and Pacific with respect on certain contingencies to payments of amounts up to I believe $330 million to be paid by Pacific to Fibreboard. And assuming final approval of the global or bilateral agreement, it is understood and agreed that those obligations are deemed fully satisfied by the amounts that Pacific is agreeing to pay as its share of the global or bilateral.

Likewise, the same is true as to certain provisions of the April 9, 1993 agreement between Continental and Fibreboard where Continental essentially agreed to back up the payments of

Pacific under that prior March 27, 1992 agreement. Those, likewise, will be deemed fully satisfied.

There was a couple of items that Mr. Rice mentioned, which we have not previously been cognizant of, some of which I just want to reserve on because I'm not sure I understand the implications, but I am sure we will work them out in negotiating the definitive agreement. For example, there was a mention -- and I'm not meaning to be all inclusive here -- of Fibreboard assigning to a trust -- to the settlement trust, claims over against others. I'm not sure I have an objection to that. I have just simply not thought through --

THE COURT: The indemnity or contribution claims?

MR. WACHTELL: Excuse me?

THE COURT: The indemnity or contribution claims.

MR. WACHTELL: Yeah, I think if we are getting a full bar order against other people, I may well have no problem with that whatsoever. I simply have not thought through the potential implications and would like -- don't want to be deemed to have acquiesced without having done so.

There is one thing that Mr. Rice said that, however, I think I understood enough to say I was not in agreement with it and I think was not understood, I think it is probably going to be an academic issue, and that is that if any money was not expended of the 95 million that is referred to in the April 9, 1993 agreement between Continental and Fibreboard, I think Mr. Rice said that any such remainder would flow into the settlement trust.

That I think is not accurate. I think under the terms of the April 9th, 1993 agreement any such money is not expended of the property of Continental; but again I think there is a good likeli-

hood all that money will indeed be expended, so it is probably an academic point.

Your Honor, I do not think I have anything else on the terms of the understandings of the parties.

THE COURT: Mr. Bschorr.

MR. BSCHORR: Thank you, Your Honor. Just a couple of clarifications to make sure that we have it. We have already discussed these agreements both the Fibreboard/ Continental agreement and the futures agreement to be ultimately written up subject to board approval. We expect to get that board approval promptly.

With respect to the Fibreboard/Pacific Indemnity agreement that has already been referred to by Mr. Wachtell, the basic understanding there is that any monies that we would otherwise be obligated to pay under that agreement, are fully satisfied here or if they are paid there, result in a credit so that there is nothing more that we are to pay.

One clarification on the California case. As Mr. Wachtell indicated, we are going to file very promptly a letter followed up by whatever else is necessary to seek to have the California court first be apprised of what happened here and secondly seek with their indulgence that they not issue any opinion with respect to the discrete issues between Fibreboard -- or among Fibreboard, Pacific Indemnity and Continental.

As part of the global futures settlement, there will be, as Mr. Wachtell said, a stipulated reversal request placed to the California court. If that request is granted, it will further -- the global will provide that if by chance the global settlement before this Court as it winds its way to the courts approve and the bilateral,

which is affixed or annexed to it, both fail of ultimate court approval, final court approval; that at that point, the appeals in California as to those discrete issues will be reinstated before that court for decision by that court, so that at the end of the day we expect if the global goes forward, if the global doesn't, the bilateral goes forward but only if both fail of ultimate court approval, do we go back to that fall back position.

THE COURT: Well, I had understood contrary to that during the negotiation this afternoon, that if the global fails, if the bilateral fails, the funds would be available to Fibreboard and would not revert back to the parties, including --

MR. BSCHORR: No. I don't understand that at all, Your Honor.

MR. WACHTELL: No, Your Honor, if the global fails, then assuming final approval of the bilateral, then under the fundamental price provisions that Mr. Rosen outlined, the monies that otherwise would have been devoted to the global will be available to the bilateral; but if the bilateral also fails final approval -- and let me say because I think I omitted to say, that what is meant by final approval there is a judgment of the Court, final judgment of the Court essentially adjudicating and cutting off any claims of any parties, direct, cross-claim, or whatever against the insurers or the policies, if that fails a final approval, well then all bets are off and the money reverts to the respective insurance companies.

THE COURT: Well, I invite counsel perhaps to have additional conversation. My understanding was that the goal sought to be achieved by Continental and Pacific was to place forever, and with Fibreboard's agreement and with the Plaintiffs' agreement, you had negotiated a limit of future liability whether it is by contribution to the trust or by indemnity payments if the trust and

the bilateral fail with Fibreboard receiving the benefit of the accrued interest.

MR. WACHTELL: No, I don't believe --

THE COURT: Am I correct?

MR. WACHTELL: I think you are incorrect, Your Honor. It has always been the position of Continental and since Pacific has come to the table, so to speak, that given the magnitude of the dollars that we are talking about and areas of the law that are not entirely free from doubt with respect to the power of the parties to enter into a bilateral agreement without participation, for example, of each and every claimant or cross-claimant, that the only way that the insurance companies would be prepared to make such monies available to Fibreboard would be if there was indeed a final Court judgment and proceedings to which all potential claimants have been made parties directly or in a representative capacity adjudicating that the agreement was valid, fair, and did cut off all of the rights.

THE COURT: I understand.

MR. WACHTELL: So that has always been an element of the understanding.

MR. BSCHORR: That certainly is my understanding.

MR. RICE: Your Honor, it is our understanding, in simple language I think, if you are going to do a bilateral agreement, if the Court finds that a fair and reasonable agreement, then the global will go forward. If the global goes forward and the Court finds it fair and reasonable and we get final decision, if the

global is for some reason not approved the bilateral stands; if the bilateral is not approved, they are back in California court.

THE COURT: I understand.

MR. BSCHORR: And just the final point, Your Honor, is, with respect to the Fibreboard/Pacific agreement of March 1992, there will be a term in this global, that any of those terms in that agreement that are not inconsistent with what we are doing here will be reaffirmed and made part of this agreement so that we have everything presented to the Court for approval and to go out for the full notice. Thank you.

THE COURT: Mr. Snyder.

MR. SNYDER: Your Honor, I am going to limit myself to picking up points where I think some addition or clarification is needed so I am not restating generally any of the terms of the agreement here.

With regard to the interim administration obligation of Fibreboard for a period not to exceed five years, I believe that we should clarify that our agreement is that that is an unconditional obligation for the period that the approval process of this global agreement is in the court. We, that is Fibreboard, will use its best efforts to get the support of its insurers to continue that through the end of the five-year period.

With regard to the waiver of confidences and privileges in order to invest the trust with the information necessary to defend the claims, we expect and there is an agreement, that the trust will be required to keep those confidences and that we will structure the transfer of that information in a way to protect them within the ambit of the attorney/client and work-product privileges to the extent that we can.

With regard to the cross-complaints for contribution and indemnity, those claims and Fibreboard's assignment to the trust, I believe that what Mr. Wachtell -- Mr. Wachtell arose on this point I believe our agreement is that Fibreboard transfers all of its right and title to those claims. If by some right of subrogation under an insurance policy or otherwise an insurance company is the true owner equitably or legally of that claim, then it would be subject to that right.

I simply wish to add to Continental and Pacific, the point on behalf of Fibreboard that Fibreboard also must have board approval, and it will be seeking board approval for entering into this agreement.

Mr. Rosen correctly made the point that the April 9th agreement between Fibreboard and Continental continues in effect with regard to interim claims administration. I would also like to point out that our arrangement is that that agreement is unaffected and continues in effect with regard to the unfinished business of disposing of the settled and unsettled present claims. It is not part of this global agreement, but it is something that survives in the April 9th agreement.

Moreover, the bilateral agreement, the price term on which Mr. Rosen described, that price term is the price term that we have agreed upon in the absence of a global agreement, going back -- in the absence of global approval. Going back to a circumstance that we just discussed. In the event that the global for any reason is not approved, the fall back is the bilateral. The price term under those circumstances is as Mr. Rosen has described it. What that bilateral says about the responsibilities of the parties in the event that the global is approved, is something that is yet to be negotiated as part of that bilateral agreement.

Those are all my remarks, Your Honor.

THE COURT: Anything further from the Plaintiffs?

MR. RICE: A couple of minor points, Your Honor. No. 1; we understand that Pacific and Continental cannot today disclose the terms of their agreement, subject to board approval. We understand upon their receiving board approval, which should be in the next few days, that we will be given disclosure in writing as to the terms of that agreement, at which time then we understand that the payments will come one from the -- one payment from Pacific and one from CNA, but it is our position that both of those payments must be made before this deal goes forward. This deal is contingent upon both payments being fully made.

In addition, I want to make it clear that the escrow funds and the interest or earnings on those escrow funds would be used for the benefit of the trust upon approval of the global, and none of those funds would be available to provide for the cost or fees in this case or in the proceedings that we are -- will go forward with.

We understand also that a request is being made to the California court to deal with the appeal. There is nothing conditional about what happens in California as far as this deal is concerned. We want to make sure that is clear. And the request from California court to enter a stipulated reversal is not a condition of the global deal in any way, shape or form.

MR. BSCHORR: The granting of it by the California court. It will be a condition that the application be made.

MR. RICE: Mr. Snyder and I seem to have a little bit of difference on the administrative -- the five years versus the period of time. We won't burden the Court now. We will try to work that out, and if not we will be back with the Court on that.

THE COURT: Mr. Wachtell.

MR. WACHTELL: Let me burden the Court on that. I guess I should have arisen to this a moment ago, but I overlooked it in my notes. When we indicated that separate and apart from the monies, that we are agreeing to pay a settlement into the trust that we had independently committed, as I indicated, to pay counsel fees, as approved by the Court, as I indicated, and the costs of notice and dissemination of notice. We are not agreeing and have not agreed to pay the costs of administration of the trust, and that includes in matters that we have not agreed and have not been consulted upon any period of five-year interim administration by Fibreboard let alone any period beyond that. That is not something we are agreeing to.

One other comment by Mr. Snyder, which I am not quite sure I understand, so let me just issue a caveat. He said he was in agreement with Mr. Rosen's description of the price term on a bilateral as a bilateral stood to -- as I understood him to say -- as a back up to a global, but then he said something about that this was not necessarily the case other than the bilateral being a back up to the global. Without seeking to understand what he was saying, I just want it to be clear that there should be no implication that in any circumstance is the consideration going to be greater than would have been payable -- or payments due from us to be greater than what would have been due under the global.

One second, Your Honor.

(Conference off the record.)

MR. WACHTELL: I'm sorry. When we said counsel fees of the class counsel, in my parlance that was meant to include reasonable expenses of class counsel in connection with the doing of the deal as well. I did not mean to omit that, Your Honor.

THE COURT: Mr. Wachtell, did you secure the identity of the presiding judge on the California panel.

MR. WACHTELL: Yes, Mr. Eshelman has that, Your Honor.

THE COURT: I will be available to meet with counsel in chambers if you want the Court to advise that court of these proceedings.

MR. ESHELMAN: That will be helpful, Your Honor. It is William A. Newsome, and I have his phone number and address.

THE COURT: Mr. Snyder, you have another matter?

MR. SNYDER: Two minor points, Your Honor, and that will be it. I want to make sure that the record is clear that Mr. Wachtell and the people at Continental have not been consulted with regard to these interim claims administration costs. That's something we need to discuss, but I am not representing that they have agreed to any of this.

Mr. Bschorr I believe said something about the Pacific Indemnity agreement with Fibreboard being satisfied by these payments, and I think he will agree that that is true only in the event that the final global or the final bilateral occur. If we fall back on our -- on the state of no agreement, the state of nature we have now where we have to go back to the coverage case, then either that agreement is reinstated or we have to work out what happens to it because that is not clear.

MR. BSCHORR: That agreement is reinstated.

MR. SNYDER: My remarks with regard to the price term on the bilateral were only intended to emphasize that what we had

agreed to, Mr. Rosen and I, about the price that is in effect for the future cases component of the Fibreboard liability in the event that the global is not approved, that is, if we have to fall back on the bilateral terms. Mr. Rosen and I have no agreement on exactly how the bilateral agreement will work if the global is completely finalized.

THE COURT: Thank you, gentlemen. I will meet counsel in chambers if you wish me to have communication with the California court.

MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. I think this is a very, very major transaction. I think it is a major step in solving and giving an example of how a problem that has plagued the courts in the nations here can be solved, and I think Your Honor provided the spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.

THE COURT: Thank you, gentlemen.

MR. SNYDER: Your Honor, for the first time in this proceeding I agree with everything Mr. Wachtell says.

(End of hearing.)

CERTIFICATION

I, Shea Sloan, do hereby certify that the following is a true and complete transcript of the proceedings had in the above-entitled matter.

August 27, 1993
SHEA SLOAN, CSR, RPR

APPENDIX C

EXCERPTS FROM TRANSCRIPT OF CLASS ACTION SETTLEMENT FAIRNESS HEARING HELD BY THE DISTRICT COURT

Opening Statement of Elihu Inselbuch, counsel for class counsel Tr. 32-36

of thousands of people will have to be decided. And I think the court will have to come to grips with the question of whether or not in these circumstances this settlement, which resolves a controversy under which significant risk was taken that there would be no payments at all, comes within the framework of the Rules of Court and the Constitution of the United States.

THE COURT: Does the definition of a limited fund have room for market forces, the negotiating process; in other words, how much the market will bear as far as an insurance company is concerned, and what they're willing to pay to settle litigation?

MR. INSELBUCH: in don't know about -- in would not address it quite that way, Your Honor. in think the definition of limited fund -- and there is -- or at least the risks that are required to be -- to exist for Rule 23(b)(1)(B) to apply certainly recognizes that if there is a risk about assets at all then there is a risk that there will be recovery.

There's at least one District Court case that has held that when you measure the assets available, you ignore disputed assets. in think one thing we can say is that when a dispute is resolved at arm's length that, in effect, quantifies what perhaps the value of the claim might have been before it was resolved.

And it may be possible to look at the trilateral settlement and say, "Well, the value prior to August 27, 1993, of the claim that Fibreboard had for insurance coverages, which as of that date was unliquidated, could now be measured in some sense

or approximated in some sense by the agreement that was reached at arm's length as between the insurers and Fibreboard. But, of course, on August 26 there was no assurance that the agreement would be reached and matters were uncertain.

What we will demonstrate to Your Honor is that even if we follow that approximation, that that -- that even with the trilateral in place, the risks that we are talking about under Rule 23 would still well be in place because the risks in the tort system could well overwhelm that fund.

THE COURT: In the litigation marketplace, the parties have negotiated a dollar amount in this proposed settlement that took into consideration the vagaries of California coverage litigation and the contribution, if any, Fibreboard could make to resolving claims and the prospect or quantification of future claims coming from future claimants.

MR. INSELBUCH: Yes, sir.

THE COURT: That negotiating process in that marketplace produced a dollar amount.

MR. INSELBUCH: Yes, sir.

THE COURT: And the question in rather inartfully asked before is: Does that fund, prospective fund that's been negotiated now become legally a limited fund because it reflects the reality of the litigation marketplace?

MR. INSELBUCH: There are some who certainly believe that that is the case, that that is a way to approach and analyze what is before the court.

THE COURT: But whether it does or not, should that affect any decision this court has to make? You thought you were just going to make an opening statement, didn't you?

[Laughter]

MR. INSELBUCH: Well, in think it's probably useful for the court, whatever the court's questions are at the outset, to be addressed so that the evidence can be heard in that context.

The answer, Your Honor, the are a number of ways among us of looking, that we all have of looking at why Rule 23

provides a route, a procedural route to a resolution her. And one thing in would say at the outset about the procedural rules, it's now well over a hundred years since we worshiped procedural rules and let the procedural rules govern the rights of the parties. in think we all would agree that it's the subject of the procedural rules just to provide a resolution that is within the substantive and constitutional law of this country.

Having said that, there are a number of ways to look at what Rule 23(b)(1)(B), which is the rule that we are addressing here, brings us. What are the requirements to satisfy that rule? The rule doesn't talk in terms of the limited fund. It talks in terms of when there are competing claims among a group of people. And there is a risk that the earlier claimants will, in effect, either destroy the claims through litigation process or take all of the assets and leave nothing for later claimants.

The limited fund is, of course, and example of that situation. But the limited fund, some would say, exists when you address the risk and when you address the question of what to do.

On August 26, 1993, what was the fund? If you want to ask what is the limited fund, the limited fund would have been all of Fibreboard's assets subject to all of Fibreboard's liabilities, and its assets included the disputed claim that it had against its insurers. That fund could well have been worth zero if Fibreboard had lost its insurance litigation. Because its existing obligations to prior asbestos plaintiffs overwhelmed, in fact dwarfed, its assets.

One approach to looking at the limited fund would be to say that was the limited fund or that was the situation where the plaintiffs were facing the risk that if there were no resolution then there would be no right down the road for others to be paid.

Others have other theories. Each one of the participants at these counsel tables have a different view of how one might approach Rule 23. And in would suggest, Your Honor, that we defer in-depth consideration of those issues until we've had an opportunity to brief them and present them to the court.

THE COURT: You dodged that question ver well, counsel.

Opening Statement of Herbert Wachtell, counsel for Continental Casualty Co. Tr. 49-53

to attempt to track all of the lengthy and torturous negotiations that ensued. There are, however, a couple of specifies that I think it would be worthwhile to refer to.

The first of these is the April 9, 1993, agreement between Continental and Fibreboard which operated in a critical way to shape the positions of Continental and Fibreboard going forward.

As I indicated, Your Honor, Continental deemed it essential to its interests to turn off the ongoing Fibreboard assignment program, and in particular the threatened multi-billion-dollar global settlement by assignment were they were going to pay out--agree to pay out billions of dollars of our money, and if we were to lose the coverage case and if the right assign had been upheld, we would have only been left with the recourse of writing a check.

Moreover, Your Honor, we determined that without Fibreboard's cooperation, it was apparent that it would be virtually impossible for Continental to open up or engage in meaningful negotiations with representative plaintiffs' counsel. And accordingly, a deal was struck by that April 9, 1993, agreement, and not purporting to cover all of the terms: Fibreboard would make no further assignments and would not purport to enter into any settlements without Continental's consent. That's what we got. Got some other things, but that was the critical thing we got.

Fibreboard and Continental would jointly use their best efforts in good faith to seek to negotiate a global settlement agreement of all claims against Fibreboard or Continental, present or future.

And by the agreement, the door was opened to Continental to negotiate directly with plaintiffs' representative counsel, with Fibreboard's cooperation.

But in return, Fibreboard demanded its price. Were there to be a global settlement agreement, Continental had to agree that it would be entirely funded from Continental's and Pacific's insurance coverage. And that would be true whether the claimants were pre-'59 or post-'59. Continental had to agree that whatever portion of such global settlement Fibreboard would otherwise be called upon to satisfy out of its own assets, instead Continental would satisfy and such obligation and would not look to Fibreboard for reimbursement.

The other point that I would make about the sequence of negotiations here, Your Honor, that I think is pertinent, is that it was not until the last few days, essentially the last week of negotiations prior to the announcement in this courtroom of the August 27, 1993, agreement in principle that tit actually began to appear that there was a indeed a realistic probability that a global settlement could be struck here. And the reason that is, as the evidence will show, Your Honor, was that at no time was Continental prepared to bear the entire burden of any such global settlement agreement without being -- without either receiving or being in a position to receive proportionate contribution from Pacific, which was the other insurer here.

And indeed it was for that very reason that the evidence will show that Continental had ultimately become persuaded, in the summer of 1993, that it was not feasible to attempt to go directly to a global settlement agreement with the plaintiffs and Fibreboard, which had been Continental's going-in desire and preference, because Continental concluded that tit was first necessary to enter into a settlement with Fibreboard and the Ness Motley plaintiffs which would terminate the Ness Motley litigation before Your Honor, in which Your Honor was being asked by Fibreboard to foreclose any liability for contribution from Pacific to Continental.

Because as we saw it, Your Honor, so long as Pacific viewed that lawsuit as providing a potential escape hatch from liability, there was no prospect whatsoever of getting Pacific to come to the table with their proportional share, and absent Pacific doing that there was no prospect whatsoever of getting a global settlement here.

Your Honor, the evidence will therefore establish, Your Honor, that when the April 9 agreement was entered into, albeit the parties were determined to attempt to negotiate a global settlement, and when the Ness Motley agreement was entered into in August and Your Honor appointed negotiating counsel to attempt to reach such an agreement, while the parties wished to reach a global agreement and hoped that they would reach a global agreement, it was really not until Sunday, August 22, the Sunday before the Friday, August 27 agreement in principle, that an agreement was struck with Pacific on that Sunday, where Pacific backed down and agreed to pay its share of liability, and the hope of achieving a global agreement at that point began to appear to be a realistic potentiality.

And the reason I emphasize that, Your Honor, is to -- two things: The first of which goes squarely to the questions that Your Honor was asking of Mr. Inselbuch, as I understood them.

The April 9 agreement provided the framework for the ultimate global settlement. As I have said, it gave to Fibreboard a contractual right that if there were to be a global, Fibreboard's insurers would cover the entire cost and would not look to what other wise might be Fibreboard's responsibility. And that agreement, Your Honor, not a collusive agreement by any stretch of the imagination, an agreement reached in intense arm's length bargaining at a time when there was no assurance, to say the least, that there ever would be a global agreement, was then as much a part of Fibreboard's corporate reality, its assets and liabilities on August 27th of 1993, as some tree in the forest owned by Fibreboard or some ski resort owned by Fibreboard or some bank debt

owed by Fibreboard. There was a contract. If there is a global, Fibreboard's insurers would pay the entire tariff.

Opening Statement of Herbert Wachtell, counsel for Continental Casualty Co. Tr. 54-59

And second, Your Honor, the Ness Motley agreement, the revised Ness Motley agreement, which was reached in early August of 1993, was still at a time when it was highly an uncertain deal that there ever would be a global, and the only uncertainty that the Ness Motley plaintiffs had in entering into that agreement was that they would received the up-front 50 percent of their agreed-upon value of claims. And the back ends remained far from certain. And the values, as the evidence will show, that were negotiated represented that continuing uncertainty.

And Your Honor, as I have indicated, the proofs will show that the negotiations for this global agreement were hard fought at arm's length between sophisticated counsel on all sides, and that the class was adequately represented indeed.

The proofs will show that from the outset Continental, for very good and sufficient reasons, was adamant that any global agreement here would have to be done on a non-opt-out basis. And when Your Honor asked Mr. Inselbuch what was the most difficult question facing this court in this hearing, my answer to Your Honor would be that that is the most difficult question. it is a legal issue. Is it appropriate and proper to do that on the particular facts and circumstances of this case? We deem it is or we wouldn't have been wasting out time negotiating this for months and months and months and spending, I think, $16 million on a notice campaign and coming to this court asking this court for approval. But that is, I think, the most difficult issue that Your Honor will have to wrestle with on this hearing. As Mr. Inselbuch indicated, it will be one that we will be briefing.

But I will simply say on that issue now that Continental was only willing to deal on a basis where it was putting its liability to bed once and for all, and that Continental believed that it would be impossible in the particular context of this case, in the first place, in any meaningful way to value opt-outs of future claims; and secondly, uniquely to this case, that in the light of the posture of the California coverage litigation as it existed and the anticipated timing and sequence of what was going on in that California coverage litigation to have given to the plaintiffs an opt-out would essentially have been giving to the plaintiffs a unilateral option to have or not ro have a global agreement. In other words, if developments in the coverage case seemed to be progressing favorably to Fibreboard, we would have faced the prospect of massive opt-outs from the settlement, but conversely, if developments in the coverage case were proceeding -- progressing satisfactorily and favorably to Continental, we would nonetheless be locked in. And, frankly, we had no willingness to enter into any agreement which gave our adversaries a one-way, unilateral option.

The evidence will show that plaintiffs' counsel were resistant to proceeding on that basis. They would have preferred, for obvious reasons, to do an opt-out deal and that ultimately Continental's insistence on a no-opt-out transaction cost Continental in the Price negotiations. Continental was compelled to pay more money as the price of a global settlement in order to secure total peace. And Continental as a corporate matter made the decision that it was prepared to pay more. It was prepared to pay what I think is a rich settlement here in order to put it to bed once and for all, no opt-outs, no third-party claims, no continuing entanglements here. We paid for it, and that is the settlement that is being presented to the court.

The evidence will also show, Your Honor, that the parties had originally intended to attempt a global settlement that would encompass both presents and futures but ultimately determined to simplify the negotiation and the legal issues, in part at

Judge Higginbotham's strong suggestions to the parties that a futures only transaction was what the parties ought to do.

The evidence will also show that the parties were under great pressure, as Mr. Inselburch has noted, to reach an agreement in principal at the end of August 1993, because it was plain that a decision from the California intermediate court was imminent and there was no assurance under California procedure that the unsuccessful party, no matter which side it might be, would be granted review by the California supreme court, Because under California procedure there is no right to such review; it is purely discretionary.

And there was the real prospect that the decision of the California intermediate court could be the final decision in the matter in the California courts. Neither side, Continental or Pacific on the one hand, plaintiffs and Fibreboard on the other, thought it desirable to rig the outcome of that decision.

Immediately upon the August 27, 1993, agreement in principle being reached, the California Court of Appeals was indeed asked to hold off and sever for decision, not decided major issues unique to Continental and Fibreboard on that appeal. That application was granted subject to periodic report to that court as to the status of the present settlement proceeding.

And the evidence will show that it ten took months of further intensive, hard further negotiations to reduce to agreement first the trilateral settlement agreement and then the global agreement.

And finally, the evidence will show that the global settlement agreement which is before Your Honor in this Ahearn proceeding is far preferable from the point of view of the settlement classes here than is the trilateral agreement which is the subject of the Rudd action; that that trilateral agreement, while it is so plainly superior to the parties risking the outcome of the coverage litigation, would nonetheless continue to place the class at the risk of substantial impairment of rights, would not settle the claims of health claimants it would simply give them a fund to

shoot at, would provide no scheme for equitable distribution of those claims, so that you would have a race to the courthouse with the fleetist of foot getting funds, or those who manifest the disease later cold find themselves empty-handed.

The evidence will show, on the other hand, that that trilateral agreement would be of very great benefit to fibreboard's counsel, the Brobeck firm and the other firms who would be defending the claims that would be brought against that fund and who would be required to expend hundreds of millions of dollars of legal time and costs in defending the claims of asbestos victims against Fibreboard, money that would go to the lawyers and not to the victims.

Your Honor, we will ultimately be briefing all of the issues here, that the procedures we are following we believe to be quite lawful under the Constitution and the Federal Rules; that not only has the class been adequately represented here by class counsel, but that as an added layer of protection for the members of this class this court has appointed Professor Green as guardian ad litem, Professor Green being totally independent, so that there could be no question, if this court does approve this settlement, that all interests of all members of the class have been fully protected.

Thank you, Your Honor.

Opening Statement of Fred Baron, Counsel for the Ortiz Intervenors Tr. 89-92

THE COURT: I have another notebook not. Is that from you --

MR. BARON: No, Your Honor.

MR. MILLER: That's a notebook to which we will turn later, Your Honor.

THE COURT: All right.

MR. BARON: Your Honor, I've attempted to tab some documents, some of which I may refer to in my opening that the court may want to read along with.

Your Honor, let me also begin by clearing some brush. We think that the settlement that was reached between Continental Insurance, Pacific and Fibreboard is a superior settlement; we think it is something that ought to be approved very promptly by this court; and we think that that settlement will resolve all of the issues that otherwise would be before this court. That settlement known as the trilateral is a great settlement, as far as I
m concerned, I know of no one that opposes it. And I think when it goes into place the problem that Fibreboard has with asbestos litigation will be ended and the tort claimants will be able to continue to use their constitutional and state rights to the federal and state courts.

Your Honor, having said that, there are problems with this settlement, the Ahearn settlement. The No. 1 problems is the legal problems. There is no limited fund. and to get right to the heart of the matter, Your Honor, I placed a chart up on the easel there. If you're nearsighted, like I am, you could turn to tab 41 in the documents. Tab No. 41 in our book is a letter that was sent to the stockholders and friends of Fibreboard. It's dated June of 1994, and it is a summary of the remarks of John D. Roach, who is the chairman and chief executive officer of Fibreboard. In his remarks, he discusses asbestos litigation. The bottom line to this document is the highlighted section: "Either the global settlement or the separate insurance settlement agreement," which we call the trilateral, "should resolve all personal injury asbestos liabilities within existing insurance and established reserves."

In English, that means that even if the Ahearn settlement is tossed asunder, it is not approved for whatever reason, the backup trilateral agreement will, in the estimation of Fibreboard, provide them with adequate insurance coverage to deal with all asbestos claims asserted against them in the tort system by any victim who has a problem, forever.

THE COURT: Let me treat you like I did Mr. Inselbuch. If I understand your basic premise, you pose no complaint to the fact that a settlement was reached between Fibreboard and its insurance carriers that would limit the available resources in one mechanism or the other.

MR. BARON: That's not correct, Your Honor.

THE COURT: Let me finish, counsel. Your -- your complaint focuses on the class action mechanism as a means of making available to claimants the proceeds of that settlement between Fibreboard and its carrier. Right?

MR. BARON: That's not exactly right, Your Honor.

THE COURT: Tell me how that's off.

MR. BARON: Your Honor, I don't believe that the law makes that choice available to begin with. I don't think that there ever is, has been or would be a choice under the law, 23(b)(1)(B).

THE COURT: Well, do you complain today or have any complaint about the fact of a settlement between Fibreboard and the two carriers? You know, there are some interesting issues associated with that. I mean, is there any focus from you on that aspect of this whole matter or not?

MR. BARON: I think Fibreboard has every legal right to settle directly with their carriers, and I believe particularly under these circumstances the settlement that they've reached that is before the court in the Rudd case is entirely appropriate and adequate.

THE COURT: Okay. So then as far as you're concerned in this processing I can focus on whether 23 -- Rule 23, and in particular 23(b)(1)(B), is an appropriate or legal mechanism for facilitating that settlement?

MR. BARON: That's only one of the issues that I would like the court to focus on. And I think Mr. Rice perhaps summarized it in away that joins the issue. Mr. Rice would have the court believe that the only issue here is whether the procedure set out in the Ahearn settlement would be better for claimants than what they would get if the trilateral settlement is approved. That

is not the issue. The issue is, No. 1 -- there's three pieces to this -- No. 1, can the rights of victims be abridged without their consent? First issue.

Opening Statement of Fred Baron, Counsel for the Ortiz Intervenors Tr. 106-114

So Fibreboard go Continental to agree that the only way that they could do a class action settlement was to put it so that Fibreboard would not have to pay any of its own money.

Now, class counsel wanted desperately for the settlement to go forward. But they knew all along that Fibreboard was taking this position, that Fibreboard wouldn't do it unless it was clear to Fibreboard that Fibreboard wouldn't have to pay any of its own funds. And in fact by letter to class counsel dated December 3, 1991, tab No. 12, Fibreboard, through Mr. Snyder, says, "Fibreboard has made it perfectly clear from the beginning that it is only interested in an insured deal; it intends to enter into global settlement only if it can fund the settlement on that basis. If plaintiffs cannot accept this, then the parties are wasting their time."

From day one the only way these people could get their three percent was for Fibreboard to walk free.

Your Honor, that presents too many opportunities for class counsel, particularly in view of the fact that we now have a settlement that not only is going to be appropriate through Fibreboard's own CEO's month, but I asked Mr. Snyder about the settlement. and if I might approach this, Your Honor, the last tab in the book -- actually, I say I asked it, it was the counsel for the future claimants that asked the question, Mr. Golan asked the questions, and he was asking a follow-up: If I remember correctly, you were either optimistic or hopeful that if the global was disapproved and the trilateral were approved Fibreboard could survive indefinitely?

Answer: Yes

Question: Perhaps for decades?

Answer: Perhaps forever.

Question: Perhaps forever?

Answer: Yes

Does that mean you think it is more likely than not that if that were to occur Fibreboard -- and if that were to occur means the global Ahearn settlement being disapproved and the trilateral approved -- Fibreboard could pay the future claims within the $2 billion provided under the trilateral?

Answer: Yes, that's what it means.

Question: Do you think it is more likely than not that that will happen? Although, of course, there is a risk that much more than 2 billion will be required.

Answer: Yes, I do believe that's what will happen.

So there was never any issue here but that that agreement would do the trick. the problem is class counsel couldn't get their fee, the three percent, unless there was a global settlement. They are not taking the position, and I asked them this question: would there have not been a trilateral if you had not jumped into this thing? They said they didn't know one way or the other. Maybe they would have settled. What they have done is forced on these victims a non-opt-out class that eliminates their constitutional rights to access the courts in return for a three percent fee.

Your Honor, in terms of the belief of class counsel as to the viability of this action, I would merely turn to tab 24. Tab 24 is a memorandum that was written by Mr. Rice and Mr. Cox and it was addressed to Judge Higginbotham, who was reviewing the viability of a class action. And I would ask -- what this is, it's a legal memorandum on the use of (b)(1)(B). And I would start on page 6, Your Honor, where it says, quote, this is Mr. Rice and Mr. Cox, "It is not evidence here that a limited fund exists." This is the letter, they're referring to Mr. Wachtell's letter about how you can use (b)(1)(B). It says: "The letter asserts that Fibreboard is insolvent, but it is not clear that Fibreboard would be willing to go

through a hearing and make the kind of showing of insolvency and estimation of the cost of future claims that was required in Manville. Moreover, it is not at all clear why Continental should be considered a limited fund in this situation."

Then they go on, on the next page, page 7, says: As explained above, the classic case when a limited fund proceeding should be viable is when there is a definable race or fund before the court that the court can then equitably divide among all class members whose aggregate claims exceed the limited fund. Yet if Fibreboard is not willing to put all of its assets before the court to divide among the asbestos plaintiffs, including, for example, its shareholders equity, then those plaintiffs are not being fairly treated because by the definition of a limited fund proceeding they are being forced to settle their claims against a fund that contains less than all of the assets that should be available to pay those claims.

Those plaintiffs are not bing fairly treated unless all of the assets of Fibreboard are in this deal.

Straight out of the mouths and pens of class counsel.

They then go on to say the point of this argument is that there is a bankruptcy procedure designed to marshal all of the assets of an insolvent entity such as Fibreboard and to divide them fairly among all the creditors, including asbestos plaintiffs. A limited fund proceeding should not be allowed to substitute for bankruptcy in this regard. That's what they reported to Judge Higginbotham. They site adequate cases, the memo was well written, it's clearly the law, Your Honor. Not close.

On the issue of conflict, it's very interesting that beginning in July, Judge Higginbotham was told by Mr. Snider, in a letter dated July 12th, which is tab No. 28, concerning the global negotiations, "Quote largely on the strength of Joe Rice's representation that a global settlement certainly will follow a settlement of the Ness Motley cases, the parties have made substantial progress in the Ness Motley negotiations." You settle ours, we'll do your deal.

Your Honor, Mr. Sweeney recognized that early on, as did numerous of the other parties. when Your Honor appointed these lawyers to represent the class in the (b)(1)(B), the first party to raise an objection was Pacific Indemnity. In fact, in a letter dated August the 20th of 1993, which I've tabbed as No. 31, Mr Rice reports a telephone call to his class counsel cohorts from Judge Higginbotham, says: Judge Higginbotham raised a new issue that no one else had mentioned to us. apparently Pacific Indemnity, during the discussions with CNA and Judge Higginbotham, raised the issue of a conflict for the plaintiffs counsel. Their position was that since only Ness Motley had resolved their cases, that the other claimants still had open claims. and indeed that was the case.

Tab 32 is a memo that Mr. Sweeney wrote after he had been appointed class counsel, dated August the 20th of '93, saying that he had received a telephone call from a Mr. Peter Coleman who says he is in charge of settlements for Fibreboard. He says Fibreboard is most anxious to resolve all of our present cases, Mr. Kazan's present cases and Mr. Wartnick's present cases before the deal is done. And indeed, Your Honor, tab No. 35 is the motion of Robert E. Sweeney to be dismissed as class counsel because in his words, "Your movant represents that he has a conflict of interest concerning future participation in these proceedings as he represents claimants who have interests adverse to future claimants who will have claims against the fibreboard company." He recognized and that he wanted out and he got out.

Your Honor, from a legal point of view, the deal doesn't work. From a factual point of view, the deal can't work. Here is a defendant coming to you, coming to the public, reporting to their shareholders that they have adequate funds to pay all asbestos claimants without a class action. Here is the chief counsel, outside counsel, for that company parroting that. We are dealing with the abrogation of substantial constitutional rights of victims. Will it turn out that some victims will be better off if Ahearn was approved? No question. There will be victims who make the de-

cision that they want their day in court, they want a jury trial, they try the case, they have a bad jury and they lose it. Would they have been better off taking the money in Ahearn? Of course they would have. In terms of economic benefit. But they have the undeniable constitutional right to make that decision. And, Your Honor, that is the reason we're here and why we are objecting.

THE COURT: Counsel, would all your objections be answered if instead of utilizing rule 23 we called this Chapter 11?

MR. BARON: If I had my druthers, Chapter 11 would be a viable possibility for Fibreboard to select.

THE COURT: Would this settlement not be a proper plan under Chapter 11?

MR. BARON: This particular settlement couldn't be a proper plan under Chapter 11, because the assets of Fibreboard are not impaired.

THE COURT: They negotiate deals all the time in bankruptcy court that winds up resolving conflicts companies have with others and leaving their assets unimpaired.

MR. BARON: Your Honor, in this bankruptcy, I don't believe anyone with a straight face would be able to say that all claimants are unimpaired. In this type of a settlement, I just don't believe that there's any -- I don't believe you will hear evidence from anyone that that's going to be the case. So in a bankruptcy situation, which there won't be, because Fibreboard doesn't need to be bankrupt, because it's not insolvent in any way, not only do they get $2 billion from these insurance companies, they get all of their other claims, with the exception of some, wiped out. when fibreboard comes out of this proceeding, if the global is disapproved and the trilateral is approved, they will only have a handful of claims left to deal with. they've estimated what the cost of settling it will be. And in the scheme of things, although hundreds of millions of dollars are a lot of money, they have adequate funds to do it. If they want to, they can walk out of this courthouse after approval of the trilateral and have no asbestos claims pending against them for the time being, until new claims get

filed. And they have then adequate funds to deal with those claims. And I hope Fibreboard does well. And I hope Fibreboard is worth a billion dollars as a corporation 30 ears from now. Because if the coverage doesn't provide enough money, those victims in the back end will be able to utilize the value of Fibreboard to satisfy heir claims rather than merely wait in line as they would under Ahearn.

Your Honor, I've read Rule 23 over and

Testimony of Stephen Snyder, Fibreboard counsel Tr. 144-45

get out of control. So what Fibreboard looked for mainly when it went into the facility, I believe, at that time was a chance to exercise some influence on dockets, to do something about the number of cases that were coming on the dockets where there didn't seem to be any disease, and to keep the defense costs and the values within reasonable limits. And it was -- it was going to be though the bargaining ability of the facility to settle cases on large numbers of defendants -- for large numbers of defendants that the facility hopefully would be able to exercise that control and keep the litigation within rein.

Q. At the time Fibreboard entered the facility, would you explain the corporate goal which was described by some in opening statements with respect to managing and resolving the asbestos litigation?

A. It had been Fibreboard's corporate goal for some time to manage and resolve its asbestos liabilities within its available insurance resources. That was a principle that was etched onto the forehead of every asbestos lawyer that worked for Fibreboard and had been for years.

Fibreboard was spending, for a company of its size, enormous resources out of its cash, because it had to pay lawyers to prosecute its coverage litigation, and the goal that it had in mind was this deliverance that it would get if it was successful.

Viewed from Fibreboard's perspective, how did the ACF perform with respect to these fundamental matters on which Fibreboard was measuring things?

A. I think the facility did a very good job of controlling costs. And I think we all learned a lesson that those transaction costs could be squeezed out of the system effectively and still maintain a credible case processing and settlement reality in the litigation. For Fibreboard, and this is not true for all people in the facility, but for Fibreboard it did not work on liability and case control issues. The cases in the west, where Fibreboard was accustomed to paying a share much greater than 12 percent were controlled. The dockets did calm down in the west. But the dockets in the east and the dockets in Texas didn't det controlled. And particularly in the east, where Fibreboard was accustomed to paying a very small share, now there was a multiplication of cases in these foreign jurisdictions where it was required to pay the flat 12 percent share. And there was an increase in the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 168-175

national meeting of plaintiffs' lawyers that was reported in the Asbestos Litigation Reporter and in Mealey's that Fibreboard was negotiating towards a global settlement.

And then as 1992 wore on and we were doing the negotiations in Ness Motley, it became clear that it would be possible to get into the Ness Motley deal if you were a Ness Motley affiliate. And we had a lot of these cases in late '92 were unfiled cases. So we had a swelling of the number of cases that came on in '92, because we had gone out to each of the Ness Motley affiliates and said: We insist that you put all of your cases in this deal, whether you filed them or not, as long as they're in your office. And it was their response to this that created this swelling of filings.

Q. Now stepping back a moment and just considering the various factors that led to these various spikes and filings over

time, how did Fibreboard -- how did Fibreboard's noninsurance resources compare, when you encountered these various surges of filings, to the challenges they presented for you?

A. It depends on what time you pick. But if you pick -- if you pick the period at the end of 1992, Fibreboard had outstanding obligations to plaintiffs, claimants, on settled claims in excess of 41.2 billion. As far as cash in hand went, it didn't have any more cash in hand than it had when it came out of the ACF in 1988. In fact, it had a lot less, because at that time it was in a struggle with continental over Fibreboard's entitlement to defense resources to defend itself in litigation. So if you compare that 1.2 billion to the $200 million, or whatever value want to give to Fibreboard, the Fibreboard net worth was insignificant compared to that. And, of course, to that you had to add 60, 70 thousand pending cases that hadn't been resolved yet on top of that 1.2 billion, and then you had to add all the future claims. Whatever number you would assign to them, those have to be paid, too.

Q. Well, I would like to turn your attention to the advent or announcement of the structured settlement program upon departure from the ACF. First of all, would you tell us why you found it necessary -- first of all, explain briefly what the SSP was and is and why you found it necessary to employ that device.

A. the structured settlement program -- sometimes referred to as Fibrebucks --

[Laughter]

THE COURT: By people other than me.

[Laughter]

THE WITNESS: By a lot of people.

THE COURT: Be fair about it.

[Laughter]

THE WITNESS: -- was Fibreboard's response to its situation immediately upon coming out of the Asbestos Claims Facility. Fibreboard's situation was very unusual. Small company that wasn't worth a lot of money, compared to its liabilities, not a lot of cash available to pay claims, but a potentially very

substantial insurance asset. And when Fibreboard looked at itself and compared itself to other companies that were facing extreme circumstances coming out of the facility, the Raymarks, the Eagle-Pichers, the Celotexes, Fibreboard made a decision to go 180 degrees in a different directions from the way they had went, and it's because they had the option to go that way. I'm not saying that they necessarily had a choice. Fibreboard's option was to go to the plaintiffs and to lay before them all the facts about Fibreboard's value, its claims and its insurance resources and make a plea that the plaintiffs give Fibreboard credit as a bridge loan to get it from 1988 to the date that it would finally resolve its coverage cases. Hopefully we thought that would be done by September of 1993. And that's a date that appears as the maturity date in the SSP. But there was also a right to extend, in case it took longer than that, until 1996. And, of course, that right has been exercised, because we still don't have a resolution of the coverage cases.

The SSP, as ordinally conceived, was to ask for a hundred percent financing. Fibreboard would promise to pay fair value for the cases, but the plaintiffs would have to give a hundred percent financing. We took that to the plaintiffs' bar nationally in late 1988 and pretty clearly got turned down everywhere we went. That was the first iteration of the structured settlement program.

Q. All right. What did you do to come up with a new, better or improved SSP?

A. Couple of things. We had information from the people that we had talked to, it was pretty clear that they had a couple of problems. First of all, they wanted some cash before they would accept any kind of arrangement. And they weren't totally against the idea, but they were concerned that Fibreboard could not be trusted to conserve its resources and that if they didn't pull its resources out of it right now it might run away and hide those resources at a later time. So they were concerned about that. And in many of our talks with people, we were told that the people that they referred to or consulted with on what to do about their Fibre-

board cases were the lawyers in California, principally the norther California lawyers Steve Kazan and Howard Wartnick. We went back with the thought if we could make the structured settlement program work with those two lawyers that the word would get out that this was a program that could be trusted and accepted.

So we met with them late in 1988. I think they investigated the coverage case, they did some basic work on fibreboard's corporate resources, and we negotiated a structured settlement program in 1988 that had a 40 percent cash component in it for the pre-'59 cases that were covered by the Continental and Pacific policies if we won the cases. But we didn't have to pay any cash on the post-'59 cases, where our resources were thinnest. That was one component.

The other component was that in each structured settlement program deal that Fibreboard signed, it made a promise to the claimant that it would not make any impermissible distributions, that's a term of -- defined term in the agreement. That means it would not make dividend distributions of any kind above a certain limit, it would not do a leverage buyout, it would not do any of those corporate reorganization type things that the plaintiffs were afraid that a company like Fibreboard would do in order to escape liabilities in the litigation. That was the structured settlement program that we negotiated with Harry Wartnick and Steve Kazan. and that was half of the program.

The other half of the program was we had to figure out how to pay the 40 percent, because 40 percent was -- we didn't have that much money. Fibreboard had just over a hundred million dollars, and that was not going to be enough to finance this program. So we went to Continental and to Pacific and talked about a possible coverage settlement. It was clear we couldn't do a complete settlement, and it was clear with Pacific that they were not interested in an interim agreement. And so we entered into an interim agreement with continental Casuality in December of 1988. And those were the two pieces of the structured settlement program. Both those fell into place in December of '88.

Q. All right. Now, the court has the so-called interim agreement as an exhibit, but bearing in mind that what you say certainly isn't intended to modify or abridge any of it, would you just walk us quickly through its principal terms?

A. The 1988 Fibreboard Continental interim agreement had a term that ended in December of '92, unless there was a complete resolution of the coverage cases before then, in which case I think it ended earlier.

Under the terms of that agreement, continental agreed to pay indemnity up to certain amounts every year to fund the structured settlement program and to pay defense up to certain amounts every year. I think the caps were on a full annual basis $25 million in defense per year. And Fibreboard agreed to use its lawyers to defend the cases and to stay on the front lines, so to speak. In other words, Fibreboard had to be out there selling the structured settlement program, do as many settlements as it could, it would use the money from the interim agreement to pay the 40 percent component, and then when the coverage case was all wrapped up, if Fibreboard won the coverage case, then it would take these structured settlement program notes to continental on the pre-'59 side and present them for payment. And at that time continental would look at them and decide whether it would agree or not agree with the values of the structured settlements.

There was one other component, a very important component of the deal, and that was before Continental had to pay any of its money for indemnity for the 40 percent payments, Fibreboard had to take its hundred million dollars that it had gotten from Home, AIG and apply it first. So there was a buffer in there. That money went in first, then the Continental money went in. Then if fibreboard won the coverage case at the end, Continental would give the money that Fibreboard had put in back to Fibreboard to pay for its post-'59 liabilities. And we call that the interim agreement credit mechanism. That's the basic structure of the deal.

Q. Now, going into the interim agreement in December of 1988, was Continental otherwise providing a defense to Fibreboard in the asbestos cases?

A. No.

Q. Did fiber -- describe Fibreboard's ability to provide only a defense, if any, at that time, absent something from the insurance.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 186-196

Indemnity alone?

A. Yes. Right after that we continued talking to Pacific Indemnity in the fall and had reached, I think, an agreement in principle by the end of the year. Which was then -- I think Mr. Irwin took it to Continental to see what their reaction to it would be or whether they wanted to participate or have some involvement.

Q. All right. And obviously we have the agreement for the record, but would you tell us roughly when it was finalized and from Fibreboard's perspective what it meant?

A. It was signed in signed in March of 1991. What it meant was that in light of the difficulties that Fibreboard was having on the one hand with Continental or getting additional defense funding, and on the other hand with Continental or getting additional defense funding, and on the other hand in the litigation with judgments now having been entered in Denver Turley, and an adverse verdict in Cimino, and facing trials in New York and Baltimore, just having had filed in the middle of 1990 the Linscomb case in this court, I believe it was, the Eastern District of Texas, which sought a -- to impose a mandatory class action on Fibreboard on the grounds that it was a limited fund, the agreement with Pacific Indemnity provided two important things:

First, it provided some small amount of additional defense funding. I think there was up to a possibility of as much as $20 million to do that. And it cashed out the Pacific Indemnity

policy; that is to say, that policy which provided essentially duplicate coverage on pre-'59 cases. That would be a necessary thing to have if fibreboard was having to strike out on its own, given the existence of having some conflict now with Continental on the interim agreement.

Q. All right. After reaching -- was the agreement with Pacific conditional in some fashion upon obtaining an order from a court?

A. It was conditioned -- that reminds me. The thing was on appeal, because it was conditioned upon getting in the court of appeal in California a stipulated reversal from the appellate court. That would have the effect of providing to Pacific Indemnity what in essence would be a judgment that it was not liable to Fibreboard which would have the effect of cutting off any contribution or indemnity rights that Continental would have against Pacific Indemnity. And there was a section of Judge Brown's judgment in 1990 that did in fact provide for contribution and indemnity amongst insurers.

Q. What happened shortly after the agreement was entered into requiring stipulated appellate reversal?

A. Another department of the court of appeals, but in the same district, wrote an opinion, the Neary case -- this was like a few days after we signed this agreement saying that the court of appeals would not under any circumstances provide stipulated reversals upon the stipulation of the parties in connection with the settlement. And so as of early April 1991, we didn't know where the Pacific Indemnity deal was gonna go. And we began a process whereby we waited for the Neary case to go up into the California Supreme Court to see what would happen. In the meanwhile, time limits were running under the Pacific Indemnity deal throughout '91 and were about to expire, I believe, towards the end of '91.

Q. All right. We're going to bring the court back to 1991 in a minute. But just to finish the Pacific Indemnity story, Mr.

Snyder, did you ultimately negotiate another new deal with Pacific Indemnity?

A. Yes.

Q. When did that occur? And explain briefly what it provided.

A. The second Pacific Indemnity deal was signed in March of 1992. It had the same basic purpose, which is to provided interim defense funding for Fibreboard and provide a cash out that would allow Fibreboard to pay for its post-'59 obligations. The principal difference between the '91 and the '92 deal was that by the time '92 had ended, fibreboard had entered into assignment settlements totaling over almost a billion dollars. And the value of its settlements had been inflated substantially in the course of those negotiations. And in order to pay for the post-'59 liabilities and come out of it with any -- anything left, Fibreboard needed a lot more money. And Fibreboard's demand for more money to Pacific Indemnity was credible because the court in Alameda County had said in the Andres case that Fibreboard was justified in doing the settlements, and Fibreboard was negotiating with the plaintiffs at that time to do not only one more assignments but a global deal based upon an assignment. So when Pacific Indemnity sat down at the table with Fibreboard in early 1992, it was looking at a much different picture than it was looking at in late 1990.

Q. And ultimately what amount of money were you able to get, conditioned on what?

A. Fibreboard got some more defense money in addition to the '91 deal. I think it spend $10 million out of the '91 deal. And it got a high/low settlement essentially. The pacific Indemnity 2 high/low deal would provide as much as a hundred million dollars or as much as $330 million plus $30 million in defense costs, which would be about $360 million. Fibreboard couldn't get the high amount, however, unless first it won the coverage case, and second it got a 5.2 order. A 5.2 order essentially was the surrogate, what was missing in the Pacific Indemnity 1 deal. It would

be an order from a court saying that Pacific Indemnity, by paying this money to Fibreboard and entered into this settlement, was freed from its contribution and indemnity obligations to Continental. Of course, this wasn't an order that was to be sought in the court of appeals, because the Neary case still was in the California Supreme Court. And so this had to be an order that Fibreboard would get from some other court of competent jurisdiction over Fibreboard, Continental and Pacific. We call that a 5.2 order because that was the paragraph in the agreement that applied.

Q. And many of the documents that the court will have for consideration refer to that. So that is what is meant by 5.2?

A. Yes.

Q. What happened to the Neary case shortly after the new Pacific Indemnity agreement was reached?

A. It was reversed.

Q. Meaning what?

A. Meaning that Pacific could have settled for $140 million, but that was history. Now we had a different deal.

Q. Now I want to go back, Mr. Snyder, at this point, although you referred to it briefly, to the launch or the initiation, if you will, of the assignment settlement program. Would you give us, if you would, the essential terms of the various assignment of settlements which were negotiated?

A. The assignment settlement agreements that were negotiated by Fibreboard starting in late '90, early '91 and all the way through early '93, each were different. It just wasn't like the structured settlement program where we wrote a document and took it out to every body and everybody had to sign the same deal. These were very large settlements that we were entering into and every agreement had some differences from every other agreement. However, they did have most of the following things in common:

First of all, fibreboard paid no cash. Didn't have any cash at that time. And so it paid no cash to settle these cases.

Secondly, typically they were settlements that covered either a large number of cases in a consolidation or for that matter all the cases that a firm had in its office. And Fibreboard was doing so-called inventory deals because this was the only way that it could settle out of entire jurisdictions to get out from under these consolidated trial threats.

Since in doing an inventory deal you don't obviously go through all the files of all the plaintiffs beforehand, these provisions -- these agreements have pretty elaborate provisions in them for case processing and what do you do if somebody doesn't want the deal, whether opt-outs would be allowed, and that sort of thing.

In terms of the payment to be received for the settlement, all of the deals provided that on -- with regard to pre-'59 cases, Fibreboard would assign its right to collect the settlement amounts from Continental to the plaintiff. And that if Fibreboard won the coverage case, the plaintiff would then seek its collection from continental. They also provided for interest and they also provided that if a later court found that Continental had acted in bad faith, that the plaintiff was the owner of those bad faith rights and could collect on that as well. If Fibreboard lost the coverage case, Fibreboard had to pay for the pre-'59 cases. And Fibreboard made the same covenants that it did in the structured settlement program to preserve for the benefit of these claimants its net worth and corporate resources, so that if it did lose the coverage case, it would be healthy and well and could be liquidated for their benefit. For post-'59 cases, no cash was paid. That had been the story from the beginning. And the plaintiffs accepted the post-'59 structured settlement program note.

There was another feature. That is since we were doing overarching inventory deals that covered pre-and post-'59 cases all at the same time, both of these agreements provided a point system whereby cases were valued. Points were assigned based upon your first exposure, duration of exposure and severity of disease. The net effect of the point system was to ensure that the

preexisting relationship between the value of pre-and post-'59 cases was preserved. and so as a result of these settlements the post-'59 cases normally paid a small portion of the settlement amount and the pre-'59 cases paid a substantially higher portion of the settlement amount. An example would be that in a typical inventory of cases where 15 percent of the cases were post-'59, all other things being equal, about three percent of the money would come from those cases.

Q. The various of the assignment settlement agreements contain a requirement of obtaining a 5.2 order?

A. The earlier ones did not, but the ones entered into after the Pacific second settlement in March of '92 did, most notably, of course, the Ness Motley agreement in 1992; but also one of our agreements with Mr. Kazan did, I believe, too.

Q. All right. Was it your experience in negotiating assignment settlements that plaintiffs demanded and received some sort of premium or inflation, some might put it, of preexisting values?

A. The -- there's no doubt that the assignment settlements were inflated in value to compensate the plaintiffs for the substantial risks that they were taking. They were getting no cash, they were getting almost certain litigation with Fibreboard and Continental, and that litigation as it turned out was quite bitter and expensive in some cases; and they were really getting a right to a second negotiation with continental once that litigation came to a head and if Continental lost the coverage case.

Q. And by a second negotiation, what do you mean by that?

A. The plaintiffs took the position that they were really not settling with Fibreboard, they were simply getting entre to the insurance companies through this settlement, and they knew full well that the real settlement values would be determined when they sat down for the second time to negotiate with the insurance company if the insurance company lost the coverage case.

Q. Did those with whom you were negotiating on assignment settlements raise the possibility of legal infirmity or the invalidity of Fibreboard's right to do that?

A. Yes, they did. And they insisted that each of these settlements be approved by a court before they would -- before they would become binding upon the plaintiffs and the plaintiffs would give releases. Their concerns were Continental's very outspoken objections at that time on at least two points:

First, that the values were too high and were unreasonable and even if Fibreboard had a right to assign and settle, it had a duty to enter into only reasonable settlements.

And secondly, that the assignments themselves violated both the interim agreement which had provisions about cooperation, no assignability, and the need for claim-by-claim evaluation, and more significantly the underlying insurance policy which had a no assignment and a cooperation clause in it. And so the plaintiffs realized that Continental was taking the position that Fibreboard may vitiating their insurance here --

Q. Even if they won the coverage case?

A. Even if they won the coverage case.

Q. All right. And in view of those issues, do you have any way of estimating for us by what level or approximately how much the inflation or premium factor was in various settings.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 202-203

On the venue issue, the matter stayed in the Northern District of California and was abated or dismissed in Houston, I don't know which, and then ultimately went to judgment in Judge Thelton Henderson's court in the Northern District of California where he determined on summary judgment that those punitive damages were covered. And I think that we -- that Fibreboard got that judgment in early '92, if I'm not mistaken.

Q. And did that give you some assistance with regard to convincing folks that the assignment program was a worthwhile risk?

A. That helped. The Andres decision in Alameda County in July of '92 helped. And frankly in a perverse way the litigation that we had with Continental arising out of the assignment litigation helped as well.

Q. All right. Now tell us about the conflict with Continental on the property of the assignment program. First of all, to set the stage, there was the interim agreement by which Fibreboard was given some money for defense. Correct?

A. Yes, that's correct.

Q. And did Continental, for example, take the fundamental or basic position that compliance with the interim agreement excused or obviated any obligation it might have in that regard under the insurance policy?

A. If I understood their position correctly, they took the position that the interim agreement had redefined the policy for the interim policy and that if it complied with the interim agreement Continental was -- was -- was providing all the defense that it was obligated to provide. Fibreboard took the position that the underlying obligation to provide a complete defense existed, and that if that turned out to be that the interim agreement was inadequate, then Fibreboard was within its rights, as any insurer -- insured would be to make assignments of individual amounts under the policy to mitigate its damages.

Q. All right. Did Fibreboard's position in that respect generate intense controversy?

A. Very intense controversy. Continental objected to everything about this program and they objected to every negotiation that occurred under this program, and they objected at every stage of every negotiation that occurred under this program. They objected that the assignment program violated the policy, it violated the interim agreement, that it -- that Fibreboard was improperly diverting AIG/Home monies

Testimony of Stephen Snyder, Fibreboard counsel Tr. 205-208

object to the relevancy of this testimony.

THE COURT:

He's about persuaded me, Mr. Miller.

MR. MILLER: Your Honor, the relevancy of this is that it absolutely explains and sets up the controversy between the parties which gave rise to and justified the assignment settlement program, out of which whatever, or to a very large degree, whatever bargaining leverage Fibreboard had arose.

MR. BARON: How is that relevant to any issue in this case?

MR. MILLER: It was relevant to show that this was absolutely adversarial, hard fought. This is how we got to where we are today. Nothing collusive, nothing put up abut it, it was a dogfight. And in simple language, we think that is much of the relevance of what we're offering to the court in this regard.

THE COURT: Go ahead.

MR. MILLER:

Q. Mr. Snyder, we have in the record the chronology of the various litigations that ensued between the parties, but again for the benefit of the record at this point, could you quickly sketch out the litigation that was brought between Fibreboard and the insurers with respect to the assignment program?

A. Assignment litigation ranged from early 1991 through 1993, was actually concluded in this court with the April 9th agreement. I think the first piece of litigation was in Cimino itself. After the Cimino settlement in 1991, there were cases filed in New York, there were cases filed in California, we made two trips to New York, actually, it turned out to be rather protracted litigation for Fibreboard and rather expensive. We would get close to a judgment wherein we were trying to get the right to assignment established and Continental would settle with the plaintiffs directly, and then we would lose the benefit of the rightness of that controversy and have to go to another forum. So we went

through six or seven pieces of litigation, including preemptive litigation brought by Continental in the Norther District of California before Judge Peckham, but he deferred to the local district courts and so that never went anyplace.

All these lawsuits, by the way, were required by these agreements. We would take the agreement to Continental, they would object to it, and then the agreement with the plaintiff would require fibreboard to get a court order approving the settlement.

Q. All right. And typically the litigation sought a declaration that Fibreboard was within its rights to make an assignment settlement?

A. That's correct.

Q. Did Fibreboard eventually obtain a trial court decision on that question?

A. That was the Andres case that I have already mentioned in July of '92.

Q. Was there a writ taken by the insurers from the Andres decision?

A. I believe so, but I don't remember specifically. It was appealed.

Q. And eventually it was appealed?

A. It was appealed, yes.

Q. And very recently what happened to that appeal?

A. Very recently the Intermediate Court of Appeals in California has reversed Andres and has handed down a decision that Fibreboard did not have the right to enter into assignment agreements. That was just recently and, thankfully, after the April 9th agreement when the parties settled that dispute.

Q. Does that controversy in Andres continue to be an active matter in the reviewing courts in California?

A. Fibreboard has applied for certiorari in the California Supreme Court.

Q. I would like to turn your attention, if the court please, to the global negotiations.

[Laughter]

MR. MILLER:

Q. First of all, would you tell us basically in segments, or however it's comfortable for you to describe it, how, generally speaking, global negotiations proceeded?

A. Well, there were two phases. The first phase was commenced in 1990, not 1991, and essentially concluded about the time of the April 9th agreement that was entered into in connection with the Fibreboard suit against Continental arising out of the Ness Motley agreement. And then the negotiations after that involved Continental and were three-sided and ultimately involved Pacific. And those were included -- concluded here on August the 27th in the agreement in principle and ultimately in the definitive agreement in December of 1993. That's the agreement we're here on this week.

Q. Surely. Let's take the first step first, and tell us, if you've would, whether there were events

pursue this matter?

A. Yes. For the first time in early '91, I learned that Mr. Wartnick, Mr. Kazan and Mr. Motley and I believe Mr. Rice had retained Elihu Inselbuch.

Q. Did you discuss with these lawyers at some stage any concerns you might have had about keeping their colleagues in the plaintiffs' asbestos bar informed of developments?

A. We had a couple of meetings in the late winter/early spring, I think it was March of 1991. On their side, they said they needed more information and give Fibreboard a list and specification of things that they wanted, mainly having to do with claims-handling history and financial information.

On my part, I asked two things:

First of all, that they keep their colleagues in the plaintiffs' bar informed about our negotiations so there was noting --

there would be no surprises. And secondly, that they keep -- that they would keep in mind that never, under any circumstances, would Fibreboard pay any of its own equity in this deal.

Q. Did you inform Continental of your intention to explore with the plaintiffs' lawyers a possible assignment-based global resolution?

Testimony of Stephen Snyder, Fibreboard counsel Tr. 227-234

on a price term at that time, what happened to those negotiations? In other words, why don't they result in an agreement?

A. I used a term at that time, I guess I still use it, called leakage. Fibreboard couldn't tolerate any leakage in the deal. Fibreboard would spend the 278 million it had, and it would have to fight to get that, but it couldn't allow for any additional liabilities in the structure of the deal. When we started talking about leakage issues, opt-outs and contribution and indemnity claims, it became a big problem. We sat down and tried to figure out how to value, for purposes of crediting back to Fibreboard, future opt-outs particularly, and we realized that we didn't know how to place a value on a future opt-out, because not even the future opt-out would know in many cases whether they would have ever a claim or not. So that became almost an impossibility.

And when something like that becomes difficult to evaluate, in the context of these negotiations which were pretty hard fought, it magnifies in scope. I mean, I was looking at those potential liabilities as quite large. And Elihu Inselbuch was trying to convince me that they weren't quite large. And I wasn't going to be convinced about that. The same was true of the contribution and indemnity claims. Contribution and indemnity had not been a problem in the litigation up to that time. But post-Asbestos Claims Facility, we had a conduct on behalf of some defendants, like Owens-Corning Fiberglas, was suing a lot of people for contribution and indemnity. And I didn't know where that was going

to lead. And so I couldn't get comfortable with the fact that if Fibreboard accepted some percentage responsibility for contribution and indemnity claims in that structure and couldn't get nailed down the value of the opt-outs, that Fibreboard could not afford the settlement. And Mr. Inselbuch would not ask the class to take that responsibility. And we reached impasse. And basically our settlement talks stalled sometime in early 1992 because of it.

Q. Did you give CNA your views about whether this was a desirable arrangement in price?

A. I think it was sometime in early '92, in an effort to jump-start this processing again, I wrote Mr. Inselbuch a couple of letters to see if I could interest him on different structures. And we also went to Continental to tell them that we thought that it really would be in their interest to take the entire responsibility for the deal, accept the $2.1 billion liability, and settle out as part of the global. I couldn't interest Mr. Inselbuch on the one had in an altered structure; I could not interest Continental in that proposal, although we did get a letter out of Continental, I think it was in early '92, to the effect that Continental, if it were permitted to negotiate, would put up a nominal value of $1.5 billion for all the present and future pre-'59 cases, subject to the outcome of the coverage case. Which means that the billion five would go away if it won the coverage case. And that was a nonstarter, and we didn't have any more talks on that basis.

THE COURT: You're still talking about an opt-out arrangement at this point?

A. I have not idea what arrangement Continental had in mind other than the 1.5 billion.

THE COURT: Your conversations with plaintiffs was opt-out?

A. Yes. I did not have the bargaining tools necessary to carry the day on that point. But neither could I agree to the opt-out open-ended structure that had been placed before me and the price that had been demanded.

MR. MILLER:

Q. During the course, then, of 1992, did you find yourself in stalled global negotiations?

A. I think what happened in '92 was that I tried to convince everybody that global negotiations were simply adjourned. And Mr. Inselbuch tried to convince everybody that the global negotiations were dead and would never resurrect. I tried to convince people that the global negotiations were adjourned because it had such a salutary effect on the assignment program. People just flocked to us in droves to do these deals, if they had thought that there was an assignment deal coming. That was the good news. The bad news was they were also filing a lot of claims against Fibreboard to get in under some yet-to-be-determined deadline.

Q. By the end of the year 1992, Mr. Snyder, roughly how much of the debt, if you will, was outstanding, how much was owed asbestos claimants in settled cases?

A. I've tried to do the gross numbers on this under tab 3. I compare the defense. In 1988 to '89, '88 was only a three-month year, Fibreboard spend about $50 million in defense costs to get about $25 million in settlements. That was the period when we were trying to sell the structured settlement program on a case-by-case basis.

1990 was a little bit better.

Fibreboard spend $52 million, roughly, to get about $46 million in settlements.

When we ran out of money at the end of 1990, we had to flip this whole thing on its head. And so as is shown here on this exhibit under tab 3, we almost halved the defense costs. Be we had -- to about $26 million. Be we did assignment deals in the range of $26 million. And in 1992, particularly after it looked like we weren't going to be able to do a global and that the only way Fibreboard would get credibility with continental was through the assignment program alone, we actually almost tripled or more than tripled the assignment program, doing $943 million in settlements, and we yet further reduced the defense cost to $21 million. So that's where I get my conclusion that by the end of

'92, Fibreboard was in debt well over a billion two to the plaintiffs.

Q. Turning your attention to early 1993, Mr. Snyder, what did you consider to be your bargaining position with respect to Continental at that point?

A. Going back to the three things that we had on our minds in 1990, when we started the assignment program, in early '93 we had a new Pacific Indemnity deal which called for a 5.2 order but which could give us as much as $360 million, which I hoped would be enough for Mr. Inselbuch, if I got back to the bargaining table with him, for post-'59 cases. We needed a 5.2 order to ring the bell at that high number. And so we were in litigation against Continental in Texas in the Ness Motley deal in order to get that order.

The assignment program had been a very substantial success, and so we had over a billion two in settlements that we had done. But just as important, it looked as though we would be able to do as many of those settlements as we wanted in the future. And so that is something that we were aware of and I'm sure continental was aware of. And those two things gave us great leverage and great credibility with continental. We had enough money to pay for the post-'59 cases in a global negotiation, and we had a settlement vehicle that was very unfriendly to Continental that could keep us out of trouble in the litigation and alive long enough to get to the coverage case result.

And the final piece was -- well, and the capstone of the assignment program obviously was the Ness Motley deal. That was a 20,000-case settlement entered into in December of '92. That case was a national case processing agreement, it was in litigation in Tyler, Texas, and fibreboard was seeking not only a 5.2 order in that case, but it was seeking a ruling from the court that Fibreboard's assignment program was legal. The court in California had already agreed with that, but in California a trial-court judgment is not enforceable while it's on appeal. So we were looking for a federal court judgment.

The Ness Motley negotiations provided that the Ness Motley cases, if there was a global, would fold into the global, they would be consumed by the global. And so we were in very credible negotiations with -- again, with Mr. Inselbuch, by this time Mr. Rice and Mr. Cox, Mr. Wartnick and Mr. Kazan to do a global. And in fact we had a draft of definitive agreement that we were working on in February or March. And that was a real possibility, because it looked like we had the money. In the Ness Motley settlement, we had ironed out some of the problems with contribution and indemnity. We had also done that in the Baltimore settlement. And there was a good chance that we would be able to sign a global on an assignment basis. We had those three things going for Fibreboard in early 1993, as we approached a judgment day in Tyler, Texas, in the Ness Motley declaratory relief action against Continental.

Q. What, in early 1993, was the situation with respect to Fibreboard's ability to pay defense costs and the interim agreement?

A. The interim agreement expired at the end of 1992, by its own terms. I make a frantic effort with plaintiffs to get them to sign some sort of global agreement before the term of the interim agreement, but they wouldn't do it. The reason I was concerned about that was that when the Andrus case had been decided in July of '92, we immediately got a letter from Continental saying that in light of the Andrus case, they now would provide a complete defense. I thought that as long as the interim agreement was in effect, that was not a credible position for them to take, because we were still being capped, our lawyers were still being capped in their fees. But that after the interim agreement was over, I felt that there might be a new set of legal principles that

Testimony of Clark Abbott, Investment banking expert Tr. 294

for your cross-examination of this witness is to establish that his assigned value to this company is low. Correct?

MR. BARON: I believe that's what I'm doing, Your Honor.

THE COURT: And your contention is that he is low by how much?

MR. BARON: Your Honor, he's probably low by somewhere between 40 and $50 million.

THE COURT: All right. Why do I need to hear any more on that subject?

MR. BARON: Got another subject to raise with him, Your Honor.

Q. Mr. Abbott, I've been waiting for this opportunity --

[Laughter]

THE WITNESS: Mr. Baron, is this Abbott exhibit 1?

[Laughter]

MR. BARON: Your Honor, by the way, I would move into evidence the prior two documents that I handed Mr. Abbott.

THE COURT: Those are numbered --

MR. BARON: Well, I think we should probably renumber these documents. They were

Testimony of Clark Abbott, investment banking expert Tr. 299-300

THE COURT: Is this still on your 40 million point?

MR. BARON: No, Your Honor. Your Honor, they put on 40 minutes of direct examination on this witness. I think I'm entitled to do cross.

THE COURT: You're doing cross. That's exactly what you're doing. I'm just trying to find out where you're going and

what you're after and whether it makes any difference. I mean, I may agree with you on the 40 million. And if that's all we're going to establish with this witness, let's get back to Mr. Snyder.

MR. BARON:

Q. Mr. Abbott, on page 3, where the company is describing their asbestos liabilities, they state, "Either the global settlement or the separate insurance settlement agreement should resolve all personal injury asbestos liabilities with an existing insurance established for reserves." Do you have any information that would indicate that's false?

A. Where are you, sir?

[Laughter]

MR. BARON:

Q. Last full sentence under the section on asbestos.

A. I don't have any information that would indicate it's either true or false.

Q. The next section is on asbestos in buildings. Did you attempt to evaluate the status of Fibreboard in terms of potential liability for property damage asbestos cases?

A. I considered it in doing my valuation, sir.

Q. All right. In the statement that Mr. Roach makes, he states: Fibreboard's asbestos in buildings litigation continues to decline; there are only 16 pending cases which have not been resolved. And then he recites that he has 175 million in confirmed coverage with as much as 245 million in additional coverage. Then he says based on his experience, claims can be resolved for a fraction of that amount. What deduction, if any, did you make from the value of this company for their property damage liabilities for asbestos?

A. Basically I took no deduction, although I did spend a fair amount of time on this subject in my interview with the company.

Q. Based on your interview of the company, based on your review of the records of this company, do you believe today that Fibreboard is a healthy company, ex-asbestos liabilities?

Testimony of Stephen Snyder, Fibreboard counsel Tr. 303-304

issues that had, I guess, bedeviled you in your early attempts to get a global arrangement put into place, how did the Ness Motley negotiations enter into your thinking about ways to approach the global?

A. The global negotiations broke down over opt-outs and contribution and indemnity. Contribution and indemnity was a very big issue in the Baltimore litigation because of pro tanto releases, Swaggart releases, things that were very difficult for me to understand, but also made it very difficult for me to settle the cases because of contribution and indemnity issues. We started working on a solution to that in the Baltimore settlement, and we continued with that in implementing some of the things we developed in Baltimore when we picked up he Ness Motley Settlement. We also worked on -- we also worked on the opt-out issue with regard to present and futures, which had been a problem; and we worked on significantly at this point valuation of cases. Because if we were going to do a Ness Motley deal that rolled into a global, then the price of that agreement certainly was going to become a factor in any global negotiations.

Q. When you were negotiating with the Ness Motley firm at the time, how big of a factor were they for Fibreboard? What percentage of the cases across the country did they control or were they involved in?

A. To one extent or another, it appeared they were involved in about 50 percent of all cases brought against Fibreboard across the country.

Q. And did you anticipate that whatever was done with regard to pricing the Ness Motley settlement would have some carryover effect or implication for any global arrangement you might be able to put together?

A. That was true and basically in an outgrowth of the agreement. If you read the Ness Motley agreement, it says that the -- that the parties that are settling in the Ness Motley deal will

accept a global settlement or that Mr. Rice would negotiate an inferior settlement.

Q. Now I would like to bring your attention, and the court's, to early 1993. You have told us the position you found yourself in. And I want to direct your attention to a status conference that was being conducted in Tyler in the February/March period of time. Do you recall that?

Testimony of Stephen Snyder, Fibreboard counsel Tr. 309-326

was still of the opinion that we were fairly close.

Q. All right. And indeed within a matter of days before April 9 agreement was eventually signed, did not give some rather direct representations to Continental about the imminency of a separate global assignment with the plaintiffs?

A. We had a definitive agreement drafted, we had some terms that were still under discussion, but we certainly got a lot farther down the road with regard to this agreement than we had been in 1991.

Q. All right. So armed, as it were with what you thought was an imminent assignment based on the global with the plaintiffs, you turned to the April 9 agreement. And I would like for you to tell us from your perspective what it is basically that Fibreboard got in that agreement and basically what it was that Continental gave.

A. We reached a compromise --

MR. MILLER: Wait a minute.

[Laughter]

MR. MILLER: I'm sorry. You had to give something up to get it, Mr. Snyder.

Q. Would you tell us what that was?

A. We had several meetings with Judge Higginbotham. We had several meetings in Dallas where Judge Higginbotham was -- his office is, Fifth Circuit, and I believe it was at the law

firm Vinson & Elkins there. Those meetings went late into the evening, they were fractious, they were contentious, sometimes they were downright nasty. What was most difficult in my perception for Continental was making the commitment to get the global and have it include all the cases, particularly the language, the best-efforts language, which was I believe viewed by them, I know it was viewed by me as a standard that could be judged in the courts and by which they could be held.

What was troublesome for Fibreboard was trying to determine whether it had enough to justify giving up what it had. Because when it got the best-efforts obligation of Continental, it had to give up its right to do assignments, which it did; its right to do a separate global, which was not a bird in the hand, but it was a lot closer than it had been in 1991, which it did; and it had to accept a, in effect, a fuzzing of its rights under the agreement. Fibreboard continued to be obligated to seek the 5.2 order, but the structure of the April 9th agreement was such that Continental essentially supplied equivalent value for that, thus diluting Fibreboard's economic incentitives to get a 5.2 order. So Fibreboard found itself on both sides of that line.

And finally what Fibreboard -- after giving that up, it got the best-efforts commitment and it got a basic commitment on the part of Continental in the interim to fund the defense of the cases. And by that I mean something that was -- that got rid of the disputes we had about defense of the cases. And by that I mean something that was -- that got rid of the disputes we had about defense camps and the matrix-type hourly rate thing that had been imposed upon the Fibreboard lawyers.

Q. How, from your owner perspective, did you evaluate what you had obtained in the April 9 agreement?

A. If you assume that the best efforts obligation was meaningful to Continental, it was an extremely important step for Fibreboard.

Q. Why?

A. It meant that for the first time there was no difference between pre- post- '59 cases, for purposes of Fibreboard's planning for the future. Instead of looking at how Fibreboard could husband resources now to pay for the post-'59 liabilities, Fibreboard totally shifted its focus and determined to dedicate itself totally to supporting Continental in getting a global. Because the way the agreement read, if a global was achieved, and only if a global was achieved, then all of the liabilities would be paid for by Continental. If a global was not achieved, then that -- then the parties would fall back on their coverage rights.

So for purposes of going forward and getting a global, Fibreboard had a commitment from a very large debtor to pay for all the cases. And therefore, if that was good promise, one that would be kept, Fibreboard had a commitment from a very large debtor to pay for all the cases. And therefore, if that was a good promise, one that would be kept, Fibreboard had achieved its goal.

Q. After the April 9 agreement, how did your efforts and the focus of your negotiations change?

[Laughter]

A. -- and the plaintiffs in getting a global. And I became kind of a friend of the premises at that point.

[Laughter]

Q. You were friendly but substantially disarmed, is that clear to say, Mr. Snyder?

A. Well, Fibreboard no longer had any leverage in the equation to speak of excerpt the continuing obligation it had from Continental to use its best efforts. But Fibreboard had knowledge of the cases, it had an understanding of what the negotiations had been in '91 and '92, and if I thought that the plaintiffs were demanding too much in the negotiations, I was quick to point that out to them and to remind them of positions they had taken earlier. And if I thought Continental was digging in its heels and had been sending inconsistent messages about values and negotiations, I made that plain to them, too.

Q. Even though you had reached this agreement, what was the situation with regard to your obligations as to a 5.2 order under the Ness Motley deal?

A. That continued. And that litigation didn't go away. It was pending. And Ness Motley -- we had litigation that had to be resolved. And so we had to attend the Ness Motely -- to finishing whatever had to be done in the Ness Motley deal under the terms of that agreement.

Q. Do you recall a meeting at the Caplin & Drysdale in Washington in May of that year?

A. Early May, yes. In Washington, D.C.

Q. What did I say? It was late April. I'm sorry.

A. Late April/early May.

Q. Well, my fault. I said May. Again, the details of the meeting are confirmed in the documentary materials. But would you tell us, were there a proposal made on the date? And what happened to that proposal?

A. Up until that time, I had joined with the Continental people in urging the plaintiffs to take seriously the possibility of restarting the global negotiations and getting quickly down the line. Keeping in mind that the California Court of Appeals was getting into the business of hearing argument and we were looking at a closure if at the court of appeal level sometime in 1993.

We were able to set up a meeting with the plaintiffs at Caplin & Drysale, I think the last day of April/the first day of May in 1993, and Mr. Wachtell spoke on behalf of Continental and Fibreboard. All of the first day of the meeting essentially laying out in great detail the position that Continental and Fibreboard were taking in the global negotiations; and then early the next morning we reconvened and after being invited to by the plaintiffs, Mr. Wachtell presented an offer.

Q. Was Pacific Indemnity there?

A. Pacific Indemnity came or was invited to and tried to come to the second day.

[Laughter]

Q. When the offer was being made?
A. When the offer was being made, yes.
Q. Did they get there in time?
A. The meeting only lasted five minutes, and they were late.
Q. Tell us the offer and what happened.
A. It was -- it was a structure totaling $2 billion for all present and future cases, said to be of present values at some lower number, I don't know what it was, but obviously if fairly discounted over time it was substantially lower number. Presented as a serious, non-negotiating offer by the defendants to -- to enter into a mandatory global settlement.
Q. You say it was presented as a non-negotiating offer?
A. As not a negotiating offer, yes. It was not presented as a non-negotiable offer, however.
Q. I understand. What happened when the plaintiffs heard it?
A. They left the room and two minutes later they came back and said that they rejected the offer and the meeting was over.
Q. Following --
A. And then they left the room again.
Q. Did you then make some effort to put together a bilateral, so-called, insurance settlement following that meeting?
A. A couple of things were going on at that time. We had available to us Judge Higginbotham's offices. We were still working with him in connection with the Ness Motley deal. He was still listening to us about global matters. And so on one front, I think we prevailed upon him to try to assist the parties in -- in putting something back on the global front. And I think there was a certain amount of depression and despair on the Fibreboard/Continental side. So we did discuss the possibility of perhaps Continental buying out the Fibreboard policy and then Fibreboard would do what it could either to do its own global or simply go off on its own.
Q. And what happened to those discussions?
A. We had meetings in New York, we had a meeting in San Francisco. They were very unproductive meetings. In fact, you

know, it was -- it would have bene better had the meetings never occurred for the ability of Fibreboard and Continental t o work together. And it was very clear that we weren't going to be able to do that sort of deal.
Q. Now, at that time in the year, what were the major open issues, if you will, the unresolved issues that needed attention with respect to any possible global?
A. I think there were four issues.

1. We wanted to negotiate with somebody. And we had difficulty getting that accomplished.

[Laughter]

2. There was price.
3. There was structure.
4. There was Pacific Indemnity which still had not come to the table

Q. And leaving aside the problem of finding someone to negotiate with from the plaintiffs' side, I want to sort of walk you through those issues.

Price, first of all. After the unsuccessful meeting, what --

THE COURT: I don't understand. Talking about price of what? You can't be talking about price of the global, because he doesn't have anybody to negotiate with.

[Laughter]

THE COURT: Are you talking about the price of the buy out?

MR. MILLER: I am, Your Honor, talking about price issues related to the global which still sprang hopeful in Mr. Snyder's heart.

THE COURT: Well, in your meeting where the plaintiffs walked out, I believe this is the first time they waled out, wasn't it?

THE WITNESS: Yes, first --
THE COURT: First walkout?
THE WITNESS: First walkout.

[Laughter]

THE COURT: Was that articulated by them to be based on price problem or structure problem? I assume structure. Or both?

THE WITNESS: It was a -- it was a broadly-based price and inability to deal with you people kind of an objection. I recall, for example, a letter that Mr. Kazan wrote to the court, it was either Judge Higginbotham or Judge Kawaichi, where he took umbrage at one of our representations to the court in Alameda County that there even existed the possibility of global negotiations. He made it clear that there was not such thing -- this was in May, I think, of '93, and he thought that we were misrepresenting the fact of even the existence of global negotiations. He didn't get along with Mr. Wachtell, and he didn't think that he could deal with him. So it was price, personality, structure.

THE COURT: The usual reasons?

THE WITNESS: The usual reasons. And I think there's a -- I honestly think there is a -- it was going to take some time for particularly the Wachtell Lipton people to start to understand the asbestos plaintiffs' bar, too. This was a very powerful, almost arrogant, in some way, group of people because of the successes that they had enjoyed over the years. And they were in their own way tough to deal with, too.

MR. MILLER:

Q. Focusing on this price question for just a moment, Mr. Snyder, was there a renegotiation of the Ness Motley deal sometime in this period of time?

A. I think if I can since the sequences a certain way, it won't seem as odd as it may to His Honor.

THE COURT: I didn't say this seemed odd. It's quite what I would have expected.

[Laughter]

THE WITNESS: Well, I agree with Your Honor that we had to find somebody to negotiate before we could have terms that divided us . And the way we got through that was through

Judge Higginbotham and through the Ness Motley deal. Judge Higginbotham, I think, and I both shared the view that this business of the plaintiffs refusing to talk to Continental or Fibreboard was itself a kind of bargaining, in a manner of speaking. They had been -- they had been given the opportunity to walk out, after seeing some money from Continental, and they weren't going to come back until they saw some more money from Continental, but they would come back.

Through Judge Higginbotham's offices, meetings were held, position papers were written, and I think through the -- a process of several meetings, not with -- not with Mr. Inselbuch and not with Mr. Wartnick or Kazan, but with Mr. Rice and Mr. Cox and Judge Higginbotham, it became clear that yes there might be some more money available.

And so I think that after we got through July, certainly, it became clear that we did need to get the Ness Motley deal done, because it was going to trial in Texas, but we also could restart the global negotiations. And when we did restart those negotiations, those were the three big issues: price, structure and Pacific Indemnity.

MR. MILLER:

Q. Was there a renegotiation of the Ness Motley deal that summer?

A. Yes, It intensified in July and came to a head late in July or early August. And was settled.

Q. Who renegotiated the settlement agreement with the Ness Motley firm, and why was the new agreement any different than the old agreement?

A. Well, the new agreement. And it took the assignment element out of the deal. And now the Ness Motley agreement became a three-party deal. In the April 9 agreement, Fibreboard had agreed with Continental that it would cooperate with Continental in converting these assignments into the three-party deals. Ness Motley was just one of those deals that we were working on. We were working on a whole number of other ones. That there-

fore took the risk out of Ness Motley that was associated with the assignability issue and the validity of the assignment issue. It also included a cash component, 50 percent. That took the risk to the plaintiffs in that deal that they would at least as to 50 percent get their money. So we renegotiated the structure and the terms and the price based upon those new values being put into the mix.

Q. Now, the renegotiated agreement presumably covered some approximate number of cases, and there was nominal price, too. Correct?

A. There was a pre -- there was a pre-'59 price based upon disease categories, and the post-'59 price was based upon the old point system. And I think that the renegotiated price, when you mixed all those two together and looked at the probable disease mix and not taking into account the fact that a certain percentage of those claims would not get paid --

Q. The first question, the nominal value per case, to start with.

A. Nominal value per case, when you mix all that together, is about 10 to 11 thousand dollars a case.

Q. Now, did you, in your own mind, do some valuation work to determine the, in quotes, price or value, however you would want to say it, absent the contingencies and uncertainties present in that agreement still at that time?

A. Well, I think it's fair to say we did more than that. The Ness Motley negotiation was becoming a stocking horse for the global on price. And we needed to have our own understanding what the implications for a global price would be coming out of the agreement. I believe that a Ness Motley deal in the range of 10 to 11 thousand dollars melded value would translate in a cash market, with no risk to values, in the seven to eight thousand dollar range. That's about $2500 more than I thought the cases were worth under a system, but it is -- was a reflection of the bargaining leverage that the plaintiffs had in those negotiations.

The way I got to that figure was I reinserted some percentage for zero pays. Historically, Fibreboard had been running

about 40 percent of its cases were Fibreboard was given dismissals for no -- payment of no money. I assumed that Ness Motley, because it was the kind of deal that it was, that a much lower percentage would be true, so I took that to be 15 to 20 percent. And then there's the discount for the payment of cash. And that I took at another 15 percent. If you apply those percentages to those numbers, I think you get down to about $7500 a case.

Q. Turning to the structure question now, were there developments or was there progress during the course of the summer with respect to the structure for a potential global deal?

A. Yes. I think as late as July, I still believed that -- well, there are two structural issues, presents and the futures, and mandatory opt-out. Certainly until sometimes in August, maybe even the middle of August, it wasn't clear whether this was going to be just presents or futures or whether it was going to be just futures. With regard to mandatory versus opt-out, I thought I saw some flexibility on both sides until mid to late July, when it became clear to me that the Continental lawyers had no confidence in our ability to solve the leakage issues with regard to futures. They've treated that as a total wild card. They would never be able to receive that value of an opt-out post-card received from a plaintiff and they were not going to allow that to occur. And I think they made it very plain to everybody by the end of July that this had to be a mandatory class. And if that meant that that changed the price, then that's what it meant. And we would have to negotiate on that basis. And they certainly convinced me by the end of July, and it wasn't much after that they had convinced the plaintiffs, I think.

Q. And on the question of a presents, futures, one or the other, when was there progress on that issue?

A. We got the strongly-worded views from judge Higginbotham that he thought that a present and futures deal was simply too complex to be sustainable in the negotiations. I think that was based on his judgment of just how poorly we got along in our negotiations. But even after he said that, and I think he said that

about the time that Ness Motley agreement was finally renegotiated in early August, I think it was about the 5th of August, even after that time it was clearly the position of the plaintiffs that they would accept a futures only or a present and futures, and it was our position that we would do it either way. But what kept confounding us was our inability to come up with a value on the presents, because the presents had become such a moving target. And Fibreboard -- that is to say, Brobeck, who was the bean counter, basically, had the bean counter role on that issue -- couldn't keep track of the new cases that were coming in. We were getting cases in huge buckets being filed against Fibreboard at that time. You know, I think that the maritime cases came in at over 13,000 all by themselves in 1993, and we simply couldn't get everybody comfortable that we could answer the question how many present cases are there.

So as August wore on and negotiations wore on, it became clear that we weren't going to be able to handle the presents in this structure.

Q. And before agreement was finally reached on the issue, where did things stand with respect to Pacific Ideminity and contribution or sharing with Continental?

A. I think this was the most troublesome term in the entire negotiations, because Continental's stated position, and it was never equivocal on this, was that it would -- whatever it agreed to in negotiations would be conditioned upon an acceptable contribution from Pacific Indemnity. And Continental got to decide what was acceptable. And there was no way that we were gonna get even close to the plaintiffs' bottom line as long as that was a condition, because it was clear to them, and they stated this, that they would give a number and then that would start another negotiation with Pacific Indemnity about how much lower than number would have to be to get Pacific to come in. And so they just wouldn't do it. And that 's where things stood in the middle of August. We had meetings in Dallas were I recall siting out in the

hallway for four or five hours at a time while the plaintiffs and Continental worked on this. Because Fibreboard could not

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dollar. Assuming there was no gap. And indeed within a few days, we were told that the plaintiffs were seeking the offices of Judge Parker to hear us in Tyler, Texas, to negotiate price. And we came to Texas, I think, on the 25th or the 26th, I don't know, but it was like a Wednesday or Thursday of that week.

Q. And I've forgotten frankly whether you have told the record. On what day was a coverage decision possible?

A. 27th, Friday, in the morning.

Q. Would you describe in as much detail as you think it needs what happened after getting to Tyler and before the matter was spread on the record?

A. We spent most of the afternoon in court right here in this courtroom trying to negotiate the price and learning from the plaintiffs that no matter what the deal, if the price term was reached plaintiffs would insist that Fibreboard do some kind of a backup trilateral as a fail-safe in the event that the global didn't work for some reason.

Q. When you say a backup trilateral, you mean a backup agreement between Fibreboard and its insurance companies?

A. Yes. Resolving the coverage issues.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 335-337

were getting close and we all sat around the dining-room table and confirmed what everybody's views were, and we spent that entire evening trying to come up with some more money from the insurers. In fact, they did come up with 25 million more dollars.

Q. Now, the $10 million Fibreboard contribution, bearing in mind what you have told us was Fibreboard's goal for years, would it be fair to say that that was money that originated with or from an insurance company?

A. All but about half a million dollars comes from what was left of then-AIG/Home settlement. and that's the source of those funds.

Q. How long did it take you to negotiate the terms of what became known as the trilateral settlement?

A. That took most of the day the next day, or most of the morning the next day. Fibreboard obviously wanted the global. The global was triggering event under the April 9th agreement for Fibreboard to get all its cases covered. The demand of Fibreboard, however, from Continental was that it would pay no more for the trilateral than it was paying for the global.

Q. Period?

A. Period. Fibreboard's point was that if -- if the -- if the trilateral was all it had, it would incur substantially higher defense costs in the tort system and that money would nowhere be equivalent to what it would be in the global.

We got nowhere with that. And we therefore basically ate the defense component in order to get the global done. And we accepted that term. And that's the term that was laid on the record the next day, that the trilateral that ultimately was worked out would have the same price as the global, and that's what we agreed to.

Q. How long did it take to negotiate the final documents.

A. There were two -- there were three final documents

Q. I'm sorry. The trilateral.

A. Trilateral? We started negotiating it immediately after– the 27th, and we finished those negotiations with signings on the 12th of October, I believe. And--

Q. I'm sorry.

A. And again they were very contentious, difficult negotiations.

Q. We have the documents, of course, but could you tell us what happened to the Fibreboard policy with respect to any type of claim that might be asserted?

A. It turned out we simply had different perceptions of what was going on in the trilateral process that had to be ironed out. Fibreboard thought it was settling asbestos liabilities, Continental thought it was getting a complete policy buy out; that is, that the payment would totally extinguish the policy. Fibreboard thought it wouldn't do that except as to asbestos liabilities. And if Fibreboard had liabilities with regard to future lead paint litigation or petrochemical or environmental litigation, those piles would still be available. That was not Continental's view. And so Fibreboard had to agreed to a complete policy buy out.

Continental, I think, looking back to the contentiousness that we had about whether they were pushing hard enough for a global, insisted that on the signing of the global, the signing of global, that Fibreboard admitted that was full discharge of Continental's obligations under the April 9th agreement to use its best efforts to get a global.

Q. In other words, quit apart from court approval, disapproval or anything else

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THE COURT: What year, counsel?

THE WITNESS: That would be 1993, Your Honor.

MR. MILLER: I'm sorry. I didn't hear Your Honor. 1993.

A. Those were the trilateral agreements entered into between Continental, Fibreboard and Pacific Indemnity. They were the agreements that the plaintiffs insisted that we enter upon before we complete the global. Basically, they provided the mechanisms for the funding of the interim processing of claims and

what would happen under the different iterations of the global and trilateral. There are three possibilities:

First, that the global was approved.

The second possibility was that the global was not approved and that the backup trilateral would take effect.

And the third was that neither the global nor the trilateral were approved.

And the agreement death with what happened in each of those circumstances.

MR. MILLER: All right.

Q. With respect to the first possibility, that is to say, ultimate approval of the global, what, in

Testimony of Stephen Snyder, Fibreboard counsel Tr. 379-385

what is out of that $1.3 billion fund. So there is some -- yes, some uncertainty about that, yes.

Q. Would you give us your perspective from the standpoint of Fibreboard, if you will, about which of the resolutions are possible here, is preferable?

A. Well, certainly from the standpoint of Fibreboard, and I would think from everybody's standpoint, the global is a superior resolution.

Q. Would you please tell us why and give us as much explanation as you think it necessary?

A. The -- the major issue, the major difference between those two situations has to do with the amount of dispute and transactional costs that will be in the system. In the trust situation, because of the way that the trust is designed , we're all hopeful that the expenses of administration and defense will be kept within the 10 to 15 percent range that we've relied on experts to advise us on. There is some evidence in other similar circumstances to suggest that that is a -- is a reasonable estimate. And we're hopeful that we can stay within that range. We already

know what happens in the tort system. In the tort system, we -- well, also under the trust, obviously, the plaintiffs' counsel fees are limited to 25 percent. So we're talking about appreciable extra value delivered to claimants in that system.

In the tort system, we know, and one of the purposes of my going through the Fibreboard defense costs yesterday is that it is not unusual to see the defense costs equal and be at the same level as the indemnity payments. In the years 1998, '89 and '90, when Fibreboard was defending claims to set values and was keeping the value in the 5,000 to $4,500 range, where I think it belongs, Fibreboard was spending more money on defense than it was spending on indemnity.

THE COURT: Let me make sure I understand what you're saying. From a claimant's perspective, under the proposed global there is a finite amount of money with the presumption being the transaction costs can be limited to 15 percent, and costs to claimants as far as attorneys' fees are concerned are by the terms of the agreement limited to 25 percent, compared to the trilateral, where attorneys' fees to the claimants are controlled by the contract with their lawyer, which historically has ranged from one-third to 40 percent. And the fund, while it would be the same amount of money, would be subject to depletion of defense costs, which if history is a guide, could approach an equal amount to indemnity.

THE WITNESS: That's correct.

THE COURT: And could impact on future claimants by subjecting the fund to punitive awards to early claimants.

THE WITNESS: That's correct.

THE COURT: Is that a fair summary?

THE WITNESS: That's correct.

THE COURT: Are there other elements that you deem significant, looking at it from a claimant's perspective?

THE WITNESS: I actually have calculated these values under tab 1 of the notebook, believe in the specific situation of Fibreboard, if these relationships hold true, that the green area in

the chart that Your Honor has before him describes what the plaintiffs and claimants would get in the trust situation because of all of that defense money that's being transferred over.

THE COURT: Over twice as much?

THE WITNESS: Over twice as much. And that that 1,046,000,000 that would be available to claimants in the trust situation would be reduced to something in the neighborhood or 460 million in the tort system, mainly because of the cost of defense. One of the truly, I found, sunrising things about this, when I was doing these calculations, in '92 and '93, is that even though the plaintiffs' attorneys reduce their fees -- and I'm assuming the fees and costs total 40 percent here, if you include the cost of running the case -- is that the plaintiffs' attorneys --

THE COURT: Now, running a case is a word of art some places.

[Laughter]

THE WITNESS: I'm sorry. We don't run cases in California.

[Laughter]

THE COURT: I assumed you were talking about --

THE WITNESS: In terms of preparing the case. Preparing the case and paying for the experts and the doctors.

THE COURT: History reveals, does it not, that many times it's 40 percent plus cost?

THE WITNESS: That's correct, in some cases it is. I've simply assumed, for purposes of these calculations, that it's 40 percent. And the bottom line is that the plaintiffs' attorneys, if to indemnity.

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under the trust because of so much money -- defense money that has been saved and transferred over onto the indemnity side.

THE COURT: Well, let me take it a step farther then and inject the perspective of Fibreboard. If I appreciate this correctly, it's -- it's an even deal as far as Pacific and CNA is concerned. They've cut a deal either way and they go home, assuming that it stands up. So it's appropriate then to consider impact on Fibreboard.

THE WITNESS: Yes

THE COURT: Now, from a claimant's standpoint, under the trilateral, at some point when the money runs out, you have whatever Fibreboard is worth --

THE WITNESS: Yes.

THE COURT: - added to the equation.

THE WITNESS: Yes.

THE COURT: The other side of that coin is, you have a total wipe-out of investor equity and the elimination of however many jobs Fibreboard provides, and whatever taxes they pay, and you write off yet another business entity to the asbestos scenario.

THE WITNESS: That's correct. No. 19, I believe. Your Honor, on the other question, adding the corporate equity, there's another chart under tab 1, the next one, which changes the question a little bit and asks: How much would it cost Fibreboard to generate $1,046,000,000 in indemnity to the claimants in the tort system? That's relevant to the question of how much Fibreboard equity would have to be added to make the claimants come out as well as they do under the trust. And the answer that I come up with, when I do these numbers with these different percentages, is it's going to cost $3.4 billion.

THE COURT: I don't understand that. Go through that with me.

THE WITNESS: Under the trust, the billion five -- three five -- provides to the claimants, in my view, a billion forty-seven net dollars to them after all costs. The tort system only provides 460 million after all costs. The question is: Looking at

it from the perspective of a claimant, how much does Fibreboard have to be worth in order to make the trilateral situation at least as valuable to the claimant as the trust? The answer to that question is: Fibreboard would have to be worth enough -- Fibreboard would have to be worth $1.9 billion in order to make those two situations equivalent, in my judgment, because the costs in the tort system are so high that even if you add $250 million on top of the 1.5 billion, or the 2 billion, the claimants only get an average 30 cents on the dollar out of that. And you have to add a lot of dollars to equate with the quality of service and value that's being delivered by the trust. That was why I think from Fibreboard's perspective, as well as the claimant's perspective, the trust is a better agreement, because the claimants are going to want a billion forty-seven million dollars and they're going to try to get it. And even though it's my view that Fibreboard can use that money to defend itself, the only way that's going to happen is if Fibreboard spends a lot of money on defense and if it persuades the plaintiffs to accept a lot less for their cases. And I've already said that I think that those values have got to go down to the $5,000 a case range. And they're at the $11,000 a case range right now. And Your Honor has been around this litigation a lot longer than I have, and he knows exactly what it's going to take to make that happen. There's going to be a lot of fighting going on.

MR. MILLER: Your Honor, mindful of the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 389-390

understanding about what they were to be paid in connection with their work?

A. I never did.

MR. MILLER: Your Honor, I attempted to ask the witness, and perhaps I should, in all safety, whether I have forgotten to ask him anything.

[Laughter]

THE COURT: You probably have. I have one other area of inquiry.

Back to the conversation you and I had a moment ago about comparison between trilateral and the global, if we -- if we inject into that one other potential scenario, and that is Chapter 11, one would think that if the global is not approved and the trilateral goes into effect in X amount of time, whether that's three weeks or three years or six years, it becomes apparent to whoever is calling the shots that Mr. Roach's statement was in fact optimistic and that there's not going to be enough money, and assuming the Chapter 11 becomes an option, have any of these companies that we're all so familiar with that have gone that way successfully negotiated a Chapter 11 arrangement that resulted in an acceptable level of assets going to claimants and survival of the company in a meaningful way?

THE WITNESS: In my judgment, from the point of view of corporate management, none of the Chapter 11's have accomplished that.

THE COURT: JM being the first to try that, essentially, if my memory is correct, the company was turned over to claimants.

THE WITNESS: I think that's the general perception, yes.

THE COURT: And the money then ran out?

THE WITNESS: And even that wasn't enough, that's correct.

THE COURT: Have there been some of the more recent ones -- I mean, are you familiar with what Celotex's prospects are? Has it depended on the litigation they have pending or --

THE WITNESS: The Celotex and the Keene, the Raymark, and I can't speak for the Eagle-Pitcher bankruptcies, have all gotten tangled up in issues having to do with corporate reorganizations and the claims of the

claimants, that those assets were secreted or disappeared before the Chapter 11 was even filed and that what was taken into Chapter 11 was a mere empty husk of the company, and that July 21, 1998 those assets were actually moved out of harm's way by corporate reorganization. And I don't think any of

Testimony of Stephen Snyder, Fibreboard counsel Tr. 399-402

and therefore have brought about a benefit of the $2 billion fund?

A. They've said that, yes.

Q. And where the court to find that application to be meritorious and award any such fee, that money would have to come out of the 2 billion as well. Is that correct?

A. I'm not sure I agree with that. But I -- I know that that certainly will be the position of some parties.

[Laughter]

MR. WACHTELL:

Q. Let me word it -- let me word it this way. Is there an agreement by either Fibreboard, Continental or Pacific to pay any such fee?

A. No.

Q. Mr. Snyder, going back, how many -- we've talked about punitive damages at times. What has Fibreboard's history been in terms of the number of punitive damage awards that have actually been granted against it and what has happened to such awards?

A. I don't believe Fibreboard has ever paid punitive damages in system. There may be an exception of one case in West Virginia where that was done in a $40,000 punitive damage verdict.

THE COURT: In settlement?

THE WITNESS: In settlement of a verdict awarding punitive damages. The number of verdicts can be counted on the fingers of a single hand. The first was the Alameda County verdict of Mr. Kazan in the Bell case, then the single West Virginia case, a $40,000 verdict. All the other verdicts have been in connection with these large trials where Fibreboard was, in my judgment, tarred with brushes that really should have related to other defendants; but those were Cimino, the West Virginia Denver Turley cases, and the Chatham cases in Houston. And those are the five verdicts that have awarded punitive damages against Fibreboard. And I believe on only one occasion, the $40,000 verdict was an amount paid in respect of punitive damages.

THE COURT: Well, have each of the large trials that resulted in at least some punitive verdict been resolved by settlement agreement by assignment?

THE WITNESS: Each and every one by an assignment settlement that since I believe has been converted into a three-party agreement.

MR. WACHTELL:

Q. And how many -- what has Fibreboard's experience been in terms of verdicts in excess of $500,000 for a particular claimant?

A. I don't have -- well, that's a rare occurrence. And it is difficult to base a judgment on Fibreboard's exposure based upon the verdict alone. I know that Fibreboard's settlements in amounts over 500,000 are -- I believe they're not more than 10, may 12.

Q. Are you talking about settlements after verdict?

A. Settlements after verdict. I mean, I believe all those settlements were after verdict. But I couldn't tell you with a hundred percent certainty that was so. And I believe there's only been 10 or 12 or those. And I think most of them were Oakland, California, settlements.

Q. Now, what has the experience been with contribution and indemnification actions being brought against Fibreboard after it left the ACF?

A. Those have been rare.

Q. There have been such actions brought, though; is that correct?

A. There have been contribution and indemnity actions brought with increasing frequency since the ACF, But I do not believe that there's ever been a judgment or a settlement contribution or indemnity.

Q. Essentially they haven't been pursued?

A. They've been brought, I think in some jurisdictions you have to bring them in order to preserve your right to a credit; and they've been pursued, Owens-Corning pursues them; but they have never come to closure.

Q. And with respect to joint and several liability under the tort laws of certain states, would it be correct to say that the existence of that liability has in fact been within historical settlement values that Fibreboard has agreed upon with various plaintiffs?

MR. BARON: Your Honor, it's really reaching a point where the leading is going too far. If we could get a question, it would be much easier.

THE COURT: Counsel, I have encouraged leading. It's a nonjury trial, we have a lot of evidence to get in. I encourage leading. Proceed.

A. I believe that's factored in, I believe punitive damages exposure is factored into the settlement values.

MR. WACHTELL:

Q. Now, can you recent for us the negotiations

<u>Testimony of Stephen Snyder, Fibreboard counsel Tr. 448-451</u>

Q. Well, in terms of you, for paying a claim or settling a claim, would it be a general statement that Fibreboard only pays

claims after they've been satisfied that the plaintiff has sustained some nature of an asbestos injury? Or at least that's the policy?

A. That's the policy, yes.

Q. Okay. And is that generally because that is the law in most jurisdictions; unless a plaintiff has sustained an injury, he doesn't have a cause of action?

A. That has a lot to do with it. There's also insurance issues as well.

Q. All right. Well, let's set aside the insurance issues. Mr. Snyder, would it be fair to say that unless and until a plaintiff has sustained an asbestos-related injury, in virtually every jurisdiction in the United States they're not entitled to receive compensation?

A. Well, I think that you're probably getting into some fuzzy areas, and you're going to have to help me with the -- your meaning of the term "injury," because we've got some cases now that are starting to crop up in jurisdictions on medical morning that -- that may tend to blur that line. And certainly the issue of injury and what its definition means has been taken a lot farther in the insurance coverage context than it has in the underlying cases.

Q. Again, let's set aside insurance for the time being. In your mind, before Fibreboard is willing to pay any settlement value at all on a case, you have to be shown, do you not , that the plaintiff has sustained a present asbestos-related injury? Right?

A. That's a -- that's factor, yes.

Q. Well, in absence of an asbestos-related injury, can you think of other reasons why you would pay a claim?

A. I can think of circumstances where Fibreboard -- it hasn't done this, but I can think of circumstances where Fibreboard would go into a situation involving heavy exposure to its products and enter into low-values settlements across the board in order to get releases. Yeah, I think some defendants have done that.

Q. All right.

A. Fibreboard hasn't done it, but it's been done.

Q. Well, it's Fibreboard's policy, is it not, not to pay money on claims unless there is a present, extant asbestos-related injury?

A. That's pretty close to true.

Q. And isn't that also the fact -- well, strike that and let me ask it again.

Isn't it also true that in most jurisdictions in the United States, those claims, the ones without an asbestos-related injury, suffer dismissal for lack of a cause of action?

A. No, I don't think that's true.

Q. Hasn't Fibreboard been almost completely successful in having those claims dismissed when they're filed?

A. I think Fibreboard has, in a litigation context, a disagreement with the plaintiffs over what is an injury. And there are a lot of cases that are filed in Fibreboard -- and are maintained and that actually receive payment of money in the system that Fibreboard believes don't involve injuries that should be compensated.

Q. Well, that goes to the extent of the injury, does it not?

A. If you were talking to a jury, I think you argue that there's no injury.

Q. Mr. Snyder, have you ever had a case go to a jury where the plaintiff came in and said, "I'm sorry, I don't have an injury yet, I've merely been exposed to asbestos"?

A. I think there have been cases tried in the past based upon pure exposure.

Q. Do you know of any case that has been successfully tried where there has been no injury at all to the plaintiff other than being exposed to asbestos? Can you think of one?

A. I'm afraid that I have put some of the large cases that have been tried in some of the mass trials in that category.

Q. Where the plaintiff has come in and said, "I've no injury at all"?

A. No, the plaintiff hasn't said that. They've come in and said, "Pay me money; I have exposure." And we don't think they have an injury, but there is a verdict in their favor.

Q. Right. Those are contested cases?

A. Yeah.

Q. What about the case now, Mr. Snyder, now listen carefully, where the plaintiff comes in and says, "I have no present injury"? Are you aware of any such case that has gone to verdict and received a judgment where the plaintiff has said, "I have no present injury"?

A. I've never seen a plaintiff say that. I've

Testimony of Stephen Snyder, Fibreboard counsel Tr. 456-457

Q. Would it be fair to say that the primary purpose of this litigation is to enforce the agreement that you reached with plaintiffs' counsel on August 27th?

A. What do you mean by "this litigation"?

Q. The Ahearn case.

A. As distinguished from all of the other 80,000 cases Fibreboard is in --

Q. I'm asking you the purpose of the Ahearn case. Wasn't it just to enforce the terms of the private agreement that was reached between Fibreboard, Continental, Pacific and the plaintiffs?

A. A. It was not a private agreement. But putting that off to one side, the purpose of these pleadings. They, plead the facts of this settlement and seek to bring it to the court and to the rest of the interested parties for examination and approval.

Q. So the sole purpose of the case is to get approval of the agreement that you reached prior to the filing of the case?

MR. MILLER: Excuse me.

MR. BARON: Correct?

MR. MILLER: Your Honor, I'm going to be reluctant to object throughout, but I believe that's an argumentative question. Mr. Snyder gave his answers; Mr. Baron may not appreciate it or like it, but it was the answer.

THE COURT: I'll reluctantly overrule your objection.

MR. MILLER: Very well.

A. I believe that the event that caused the complaint to be filed at this time related to the agreement between the parties provisionally on what the terms of the settlement will be. But I hasten to add that if you read the August 27th transcript, you do not find in it anything close to the attention to the matters that are finally addressed in the final agreements. They had to be negotiated after that.

MR. BARON:

Q. Mr. Snyder, I would now like to go back and visit with you about some of the issues that you discussed in your direct examination, and particularly some of the history -- and I'll be very brief with this. I've placed in front of you a notebook that I have used previously. If you would look in the notebook, on the front cover there is a document that was previously attached to your deposition as Snyder exhibit No. 2. And for purposes of this record, we'll call it Objector's exhibit

Testimony of Stephen Snyder, Fibreboard counsel Tr. 466-468

us all their cases in their office, that's because we're asking for their cases. And so we got a lot of unfiled cases out of the Ness Motley affiliates in 1992 and "93, because of the terms of that settlement

Q. Okay. Well, did you give Ness Motley the option of taking those unfiled claims that were unfiled in August of 1993 and moving them into the global settlement as opposed to taking the terms of the Ness Motley agreement?

A. If we had done a presents deal, they would have gone into a -- as I understand it, they would have gone into the global.

Q. by the way, the class definition here is lawsuits -- I'm sorry. People who were exposed to asbestos that had not filed a lawsuit on or before August 27th and who had not settled their claims?

A. Or who had not.

Q. Or who had not settled their claims. Right?

A. That's part of it.

Q. Whose idea was the last piece of it? Or who had not settled their claims?

A. It was the agreement of the parties.

Q. Well, if there was a benefit to be gained by individuals for being in the Ahearn class, wouldn't you have expected that Ness Motley would have insisted that the class definition only be filed lawsuits, as it was in the Carlough case?

A. I don't -- I don't think you can make that statement. Because the Ness Motley deal itself is a present and futures deal. And the Ness Motley future clients are in the settlement.

Q. But the clients --

A. They could have argued, I suppose, that all their future clients be excepted from the settlement, but they didn't make that argument.

Q. Did they make the argument that all of their unfiled cases should be included in this settlement?

A. No. We made the demand that they include all their unfiled cases, because we did not want any cherry picking in the deal. And therefore, we insisted that they give us each and every case in their office. And we made it clear, and this is our language in the agreement, that it was material term of the agreement that we get each and every case and that none be held back. That was what we insisted on.

Q. You had a cutoff time for those cases, did you not?

A. [Pausing]

Q. In the Ness Motley August agreement?

A. There was a cutoff time. I think that was a moving target. But there was a cutoff time.

Q. Well, the agreement itself, and we're talking about the August 1993 agreement, required that Ness Motley have cases that were in its office brought to your attention by no later than August 17th of 1993. Correct?

A. You tell me that's true, I'll accept it.

Q. All right. What about cases that came to them on August 18th, August 19th and August 20th? Why didn't you want those?

A. Well, you've got to have a cutoff somewhere, Mr. Baron.

Q. I see.

A. That's the one we picked.

Q. All right. Mr. Snyder, back to exhibit No. 15, can you see trend from 1972 to 1993 in terms of increased case filings?

A. Can I see a trend between what years?

Q. Between the number of asbestos cases filed each year from the beginning of time 1972 through September 9th of 1993.

A. There was an increase in the number of cases filed against Fibreboard generally as there was an increase in the volume of the cases in litigation.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 479-481

futures class mechanism.

MR. BARON: I do.

THE COURT: Under the trilateral agreement, the assumption is, under the tort system there will be a hundred percent payment of whatever their entitlement is to the various type claims?

MR. BARON: Yes. Until they run out of money.

THE COURT: So long as the money lasts, which is a cinch then to result in no money being available for either serious claims or minor claims after that point.

MR. BARON: Your Honor --

THE COURT: And I'm supposed to favor that over the other?

MR. BARON: There is a procedure available if it turns out that the company does not have adequate funds to pay everyone. And that procedure is called Chapter 11. And under Chapter 11 no one loses their job, the company continues to operate, no taxes are lost because it continues to make profits and pay the government. The company operates under Chapter 11 and each of the creditor constituencies, the small claims and the large claims, are at the table together. And a decision is made how it -- what is an equitable way to parcel out the available funds, as opposed to saying, "We'll give everything to the more significant cases and we'll hold back on the smaller cases. That's a statutory provision that's available.

THE COURT: I understand. So if it's under the -- and this is consistent with questions that I asked Mr. Snyder earlier. So if it's under the -- the structure of Chapter 11, then an apportionment scheme would be acceptable to you because that's the only option that would be available. Right?

MR. BARON: Well, Your Honor, I don't think -- that really begs the question here. The question is whether this settlement is fair. And the issue of whether it's fair is whether all of the constituencies were represented and got a fair shake at it . And in this particular circumstance, it's very clear and obvious that they did not.

THE COURT: I'm just trying to find out whether you favor bankruptcy over this proposed class action settlement.

MR. BARON: Your Honor, if I might, my favored option is the statement that was made under penalty of the securities regulations laws to the shareholders of Fibreboard and to their friends, I might add, that based on their projections they have

adequate funds to pay. That's my preference. However, if there is a shortfall, I think it's been mishandled under this trust because the right players weren't at the table.

THE COURT: If the trust were modified to where there was a percentage for all types of cases in the shortfall, would your objections then go away?

MR. BARON: All my objections? No.

THE COURT: I thought not.

MR. BARON That objection, perhaps

THE COURT: What objections would remain?

MR. BARON: Your Honor, we have filed objections, we're going to be getting into objections. I've got numerous objections to it, but this is certainly a very significant point.

THE COURT: So we wouldn't solve any immediate problems if that occurred, would we?

MR. BARON: Well, Your Honor, you know, it's a question of whether or not we're going to apply the rules of class actions to this particular case. And I think that the Second Circuit held in

Testimony of Stephen Snyder, Fibreboard counsel Tr. 510-511

opt-outs to occur without having at least two rights:

1. The right to recoup part of the purchase price that it had paid or

2. The right to, if the opt-outs were excessive, to jettison the whole deal.

And when we -- I don't think there was any principal disagreement with that. The problem was we couldn't come upon a method to value the opt-out claims either for purposes of determining whether there were an excessive number that would have the effect of making the deal unworkable or what the adjustment in the purchase price might be. And we could not resolve our differences on that; therefore, we had a term on which price was -- to

which price was sensitive that was not resolved, and that was more or less open-ended depending on what your sensitivity to risk was on that issue.

Q. Okay. In the letter on page 2, you state, "Fibreboard has made it clear from the beginning that it is only interested in an insured deal and intends to enter into a global settlement only if it can fund the settlement on that basis. If plaintiffs cannot accept this, then the parties are wasting their time." That was the position of Fibreboard?

A. That's what I wrote in the letter

Q. Was that the position of Fibreboard?

A. That was the position of Fibreboard?

Q. And that position remained the same all the way through August 27th, did it not, 1993?

A. No.

Q. When did it change?

A. At about 10 in the evening on the 26th

Q. When Fibreboard agreed to throw in an AIG policy that it had already captured?

A. No. That and some Fibreboard money, yes.

Q. All right. By the way, the total amount of Fibreboard money that is not insurance proceeds is how much in the Ahearn settlement?

A. It's about a half million dollars.

Q. Other than the 10:00 --

A. If you don't count the money that Fibreboard spent to get the insurance coverage in the first place, of course.

Q. Well, Fibreboard has been reimbursed by coverage for some of that, has it not?

A. For its coverage costs?

Q. Yes

A. I don't think so.

Q. Well, we'll get into that in a minute. But

Testimony of Stephen Snyder, Fibreboard counsel Tr. 519-521

Motley cases pretty much entirely and the only question was whether there were affiliate cases out there. And under normal circumstances, when we negotiate with the Ness Motley affiliates, we don't negotiate with Ness Motley affiliates, we don't negotiate with Ness Motley, we negotiate with their affiliates. So I don't know if we were negotiating with Ness Motley or not.

Q. Okay. Who is Michael Stanley, by the way?

A. Mike Stanley is a lawyer in my office that works on northern California cases.

Q. Turn, if you would, to tab 14.

A. He doesn't work on the global, by the way.

Q. Okay. Turn to tab 14, which is a letter dated April the 24th of 1992, to Mr. Kazan and his partner, Mr. McClaim, from Mr. Stanley of your office. You've seen that letter, have you not?

A. I've seen that letter

Q. In the letter, a settlement discussion or a discussion of settlement of certain cases of the Kazan from ensures where they're trying to settle cases with you out in the California area. Right?

A. Yes.

Q. And in the letter it says, "Fibreboard is willing to move quickly on these proposals" -- which were the proposals made by Mr. Kazan to settle those specific cases -- "especially if other special interest to Fibreboard could also be discussed, such as a resolution of future cases and your clients' participation in a global settlement."

A. I hope Mr. Stanley felt good when he wrote that, because he certainly didn't feel good after I read it.

[Laughter]

MR. BARON:

Q. You read it very recently when I showed it to you. Correct?

A. Yes. I didn't even know that that letter existed or that Mr. Stanley had taken global responsibilities upon himself.

Q. And if he did, he shouldn't have put it in writing, should he?

A. He shouldn't have done it. I don't make a distinction.

Q. Well, would it be fair to say that a reader such as Mr. Kazan or Mr. McClain might glean from what Mr. Stanley said that if they were willing to play ball with Fibreboard on the global that they would -- that their proposals for settlement of their present cases would be expedited?

A. I think Mr. Kazan will get a good laugh when he reads a letter like that.

Q. You don't believe that that's what it says?

A. I believe Mr. Stanley some day would like to do a great big global settlement. And I wish him the best of luck doing it when he gets to that point in his career.

Q. Okay. Mr. Snyder, if you would, turn to tab No. 15.

MR. INSELBUCH: So much for Stan.

MR. KOPLOW: He was a nice guy.

[Laughter]

A. What tab are we on?

MR. BARON:

Q. 15, it's a letter from Mr. Rice to you dated February the 8th of 1993.

A. Yes.

Q. You just testified a little earlier that the settlement demand that you had thought was one that were in the ballpark and you were about to agree on was 2.3 billion for presents and futures in 1991. Here we are now in 1993, and Mr. Rice has now said that, "Based on our review of all this data, we

Testimony of Dr. Lawrence Kradin, expert pathologist Tr. 553-554

substantial possibility that patients will progress to develop an asbestos-related malignancy or may progress to develop an ALD 1 type disorder from an ALD 2 background. If that were to be the case, my understanding would be that that compensation would probably be higher.

MR. RICE: Thank you, Doctor

THE COURT: Do you need to cross-examine this witness?

MR. BARON: Just a couple of questions, Your Honor. Be real quick.

CROSS-EXAMINATION BY MR. BARON

Q. Good afternoon, Dr. Kradin. I'm Fred Baron. I've got a few quick questions for you. Doctor, would it be fair to say that the majority of individuals who have been exposed to asbestos never develop an asbestos-related disease?

A. Yes, I think that's true.

Q. And also, Doctor, is it true that you cannot predict with any certainty which individual that's been exposed will indeed develop disease in the future?

A. That's correct.

Q. Doctor, if an individual were to present to you with exposure to asbestos but could not meet the criteria of any of the categories that are set out in this trust, would it be your conclusion that that individual does not presently have an asbestos-related injury?

A. That's a complicated question. I think from the point of view of a clinician, I would probably not be able to establish a diagnosis. From the point of view of a pathologist, I've seen too many cases now where there's been pathological evidence of disease. So I think the answer is that I would maintain an uncertain position as to that given patient.

Q. You wouldn't be able to say absolutely one way or the other?

A. No.

Q. Or you certainly wouldn't even be able to say probably one way or the other, would you?

A. No. But I certainly wouldn't dismiss that patient without concern.

Q. All right. Doctor, have you had the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 588-605

A. I believe this was referring to three-sided negotiations that would occur now that Fibreboard and Continental had reached agreement.

Q. Okay. Well, let's drop down to the first--to the next paragraph here. It says: "I remind you that regardless of any arrangement you reach with CNA or any proposed discussions that might take place on a global settlement, we have a Ness Motley agreement that is the original primary focus of these negotiations." What negotiations?

A. We were sitting before Judge Higginbotham, the whole purpose of our being there initially, the cause, the initiating cause, was the dispute arising out of the Ness Motley agreement. There were no negotiations going on in the Ness Motley agreement, but there was a lawsuit. And unless we dealt with that, the lawsuit was not going to go away.

Q. Well, then was he mistaken by saying that the primary focus of these negotiations was the Ness Motley settlement?

A. I think that's in artfully stated probably.

There were no negotiations.

Q. So he was wrong?

A. Well, There subsequently were negotiations to convert the Ness Motley settlement into a three-party settlement. But that was something Fibreboard had promised to do in its April 9th

agreement. As far as Fibreboard was concerned, Ness Motley was settled.

Q. And were there negotiations going on at that time between Ness Motley and Continental?

A. Later on we got into negotiations about the renegotiation of Ness Motley on terms that Continental would be willing to accept to be added to the agreement.

Q. And those negotiations went on simultaneus with the global negotiations for a class action, did they not?

A. They took place over roughly the same period of time, but I think everybody that you talked to in deposition realizes that we made a run through the end of April trying to do something on the global, and then the plaintiffs walked out, and that in May, June, and the better part of July, we mainly focused on getting Ness Motley done. And when it was done in early August, then we obviously devoted all of our attention to the gloval. But there were periods of time in the May, June and July period where we were discussing the global as well, yes.

Q. Okay. When you say you wer discussing it as well, were they being discussed at the same meetings, in the same rooms, with the same parties present?

A. In the middle period, Mr. Inselbuch, Mr. Wartnick and Mr. Kazan were not present. Mr. Rice and Mr. Cox were taking the position that they could not negotiate the global, they were not authorized to do it. Mr. Wachtell and myself and I think to some degree Judge Higginbotham were taking the point of view that they had to talk to us about it, because it was an important subject and it needed to be dealt with. And so I think that you need to talk to each individual to decide -- to get an answer on that question. Mr. Wachtell and I, after April the 9th, basically always had in mind trying to come to closure on a global.

Q. Okay. So after April 9th, it was your belief that the only negotiations to be done were on a global?

A. No, that's not true. That was our primary interest. I mean, we were renegotiating three-party agreements with scores of law

firms. Ness Motley was only one of them. We were negotiating with you, we were negotiating with other people that we had done assignments with. This was simply doing the work of trying to get rid of the litigation that had been -- that had boiled over in the assignments. And the only way to do that is to get the parties to sit down at a table and decide on what terms we can get the insurers to come in and join the settlements. That was the focus of our attention in 1993 --

Q. Okay.

A. --everywhere in the country.

Q. Now, on April the 9th of 1993, you entered into a settlement -- into an agreement, I should say, with Continental Casualty Company, did you not?

A. 9th of April?

Q. Yes.

A. Yes. Fibreboard did.

Q. Yes. When I say "you," I mean Fibreboard. Under the April 9th agreement, Fibreboard entered into an agreement with Continental that would have prohibited Continental from entering into a global settlement with the plaintiffs without assuring that that global settlement would cover all of Fibreboard's liabilities to asbestos claimants forever. Correct?

A. I think that that agreement has a passage in it that does say that.

Q. Yes.

A. and we intended that we would be locked together in global negotiations, that Fibreboard
would not go off on its own and Continental would not go off on its own.

Q. Okay. By April 9th, then, or from April 9th, Fibreboard was bound not to go out and do deals with plaintiffs on their own without Continental's consent, and Continental was bound not to do a global unless that global let Fibreboard completely off the hook. Correct?

A. Unless it met the definitions of section 2 of the April 9th agreement, which means that tall cases would be included within Fibreboard's available insurance resources.

Q. In other words, off the hook?

A. That's your term, not mine.

Q. Well, would you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let -- would not have extinguished all of the asbestos liabilities of Fibreboard?

A. No, that's not true at all.

Q. What would have been the circumstances where that could have happened?

A. I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q. Okay.

A. Just didn't work, that's all.

Q. Until August 27th, did it?

A. Well, we negotiated to try when we encountered so much difficulty with the plaintiffs, we discussed the possibility of a bilateral settlement and we weren't able to do it.

Q. But you were able to do it on August 27th?

A. Fibreboard, on August the 27th, in order to get a global, went along with Continental's demands. Otherwise, no way would we have entered into the settlement.

Q. Were you forced into it?

A. I don't want to use the term "forced," but it was an awful big carrot

Q. $2 billion is a pretty good size carrot.

A. No, that's not the carrot, Mr. Baron.

Q. What's the carrot, Mr. Snyder?

A. It was the global settlement agreement that we could not have, plaintiffs said, unless we also entered into a bilateral with Continental, and Continental said we couldn't have unless

we priced it on the identical terms as the global, which was not in a bilateral negotiating settlement acceptable to us.

Q. So the thing that forced you into the bilateral or trilateral, as it's called, was plaintiffs working out this arrangement for global?

A. Was the existence of the agreement in principle that was put on the record on the 27th, whereby we had a reasonable prospect of doing a global if the parties, Continental and Fibreboard, would agree on a trilateral. And that agreement was important enough to Fibreboard to make it give on some important points in the trilateral.

Q. Okay. Now let's turn to document No. 21. We're getting close to the end here. It's a letter dated May 12, 1993, and it's from Mr. Wachtell to Judge Higginbotham. Do you have that in front of you?

A. I do.

Q. Let's turn to page 14 of the letter. I'm sorry. Let's start -- let's get this in context. Let's turn to page 6 first. I apologize. Under the heading "Mandatory Class Action." It says: Continental is aware that plaintiff's perceive both legal and political problems with the structuring of the settlement as a mandatory non-opt-out class. Continental agrees that there are issues that must be addressed. What are the political problems? Do you know?

A. Oh, I think that the -- that plaintiffs made it very clear to us that in the abstract a mandatory class settlement would be very unpopular with the members of the plaintiffs' bar representing claimants, and that if we were going to do that it had better be a deal -- there had better be some justifications for it.

Q. Turn to page 15, if you would. On page 15, Mr. Wachtell sets out potential justifications. I'd like to go over the one that's numbered No. 6. It says: "Any political problems can be ameliorated to the extent the plaintiffs' representatives could be deemed to be acceding to a mandatory class structure at the strong urging of the judiciary." Do you know what that referred to?

A. It says what it says.

Q. Was that discussed at any of these meetings?

A. I don't think there was any secret about the fact that Continental hoped to get judges to agree with them with regard to the things they put in these letters. That doesn't surprise me at all.

Q. So that they were hoping that these judges would make it clear to the plaintiffs that they would be acceding to a mandatory class structure at the strong urging of the judiciary?

A. I think that was Continental's position. And I have a grave concern about whether that works in the asbestos litigation. I think sometimes it's very counterproductive when that happens, given the independent-mindedness of the plaintiffs' lawyers in this litigation.

Q. Mr. Snyder, did you receive a copy of the document that is tab No. 24, which is Mr. Rice and Mr. Cox's letter to Judge Higginbotham dated May 27, 1993?

A. I think I did.

Q. In reading that document, did it make it very clear to you that the plaintiffs were very strongly against the use of a 23(b)(1)(B) class to resolve this problem?

A. Yes. I believed at that time that it would be very difficult to persuade them otherwise.

Q. And did you understand why they were so opposed to the use of a (b)(1)(B) mandatory non-opt-out class?

A. I only have the reasons that they gave.

Q. And you took those reasons at face value?

[Laughter]

A. Of course I took the reason at face value in a negotiating environment. And I also took into account the fact that these people were accustomed to getting their way a lot of the time.

MR. BARON:

Q. And that the way they wanted to go was an opt-out class, if they were going to do a class?

A. That's exactly what they said in this letter at this time. They also said they weren't even there to negotiate at all. And I

took that for face value -- at face value for what it was worth, although I've already said yesterday that I thought that that in and of itself was negotiation.

Q. Bear with me for a moment here. I lost something.

Mr. Snyder, I asked Mr. Kazan, in his deposition, when he changed his mind about the 21(b)(1)(B) non-opt-out class --

A. 23.

Q. I'm sorry. 23(b)(1)(B) non-opt-out class, and he said, "I began to explore the (b)(1)(B) potential after CNA came to the table and brought its checkbook."

MR. BSCHORR: Excuse me. What page?

MR. BARON: Page 29 of his deposition, in tab No. 6.

Q. And I asked him: "Why was that Mr. Kazan?"

And he said: "Because CNA made it crystal clear that the only basis upon which they would pay money was on a limited fund (b)(1)(B) non-opt-out class."

Is that indeed what happened, that the only reason in your mind that the plaintiffs turned tail and changed from an opt-out class, that they wanted, to a non-opt-out (b)(1)(B) is because Continental said, "We won't pay you unless you do this"?

A. That's part of the reason. I think everybody believed, by the time all was said and done, the CNA wouldn't pay anything unless there was a mandatory structure. And I think everybody also believed that CNA, even under those circumstances, wouldn't pay anything more, and that we had -- we, the plaintiffs, had accomplished in getting everything out of CNA that it would pay. I think all those things are true.

Q. How could CNA have settled with the plaintiffs on a (b)(3) opt-out class, under the terms of your April 9th agreement?

A. [Pausing]

Q. Could it have been done?

A. Of course it could.

Q. They would have just had to continue paying forever and ever and ever. Right?

A. They would have had to continue to pay the opt-outs, whatever they were.

Q. So everybody could opt out, use the tort system, and it would be as if they had no settlement at all?

A. It would be as if they had assumed responsibility for the cases.

Q. Right. Which would be a total loss on their part?

A. I don't know what it would be. It would be something that they had already made perfectly clear they weren't willing to do.,

Q. All right. So they weren't willing to just step up to the plate and say, "We will insure Fibreboard forever and ever and ever." and the only thing that they would accomplish short of the under the April 9th agreement that they had with you would have been a (b)(1)(B) non-opt-out class or a separate settlement with you?

A. I think that that's a very limited view of the options that were available.

Q. What other options were there?

A. Well, there were -- I mean, I had worked -- tried to work with the plaintiffs on different levels of risk-sharing an opt-outs in the -- in the opt-out setting. I can't say that we had great success, but I mean there are gradations between falling through a trapdoor and just paying a certain amount of money with a check. And there's also the right in connection with a lot of (b)(3) classes to simply walk away from the deal if the opt-outs seem to be excessive. The problem with all of that is that it doesn't work for anybody. It just doesn't work -- not only does it not work for Continental and Fibreboard, it doesn't work for the plaintiffs, because the people who are doing the opting out at that time don't know what they're opting out at that time don't know what they're opting out, because they don't know, in many cases, what their disease is. All they know is that they have a potential for a disease.

Now, the other problem for Continental Mr. Wachtell referred to in his opening statement was the one-way option. And that was something I don't think we could sell.

Q. So the choices were narrow?

A. The -- we -- I believe that when all is said and done, to get the three parties together, this is the deal that we had to do in order to make that happen, and that given the variety of positions, very distinct position from Pacific, very distinct for Fibreboard, distinct from Continental, the West Coast lawyers on the plaintiffs' negotiating side didn't always have the same view as the East Coast lawyers, the people inside the Ness Motley firm didn't always have the same view, given the complexity of the negotiation, I believe we did the only deal we could do.

Q. All right. Let's talk about that. Flip to tab 27, if you would. It's a letter dated July the 9th, 1993, that was written from your partner, Mr. Irwin, to Mr. Wachtell regarding global settlement and bilateral settlement. Got that one?

A. I see the letter.

Q. Turn to page 3 of the letter, if you would, second paragraph. "In meetings over the last two weeks, Continental has indicated its willingness to pay $2 billion for a global settlement or a bilateral settlement with Fibreboard, in addition to $600 million for existing settlements."

So by July, they had $2.6 billion on the table for purposes of a bilateral. Right?

A. Are you meaning by that to the bilateral that we have here? Because these are not comparable figures.

Q. Oh, the number you have here is higher, no question.

A. No, it's much lower.

Q. It's much lower? The bilateral you have here, or the trilateral you have here --

A. Continental ends up paying, in my judgment, about 3.3, 3.4 billion dollars as a result of this overall arrangement. This would constitute a payment of no more than 2.6 billion. It was

not acceptable to Fibreboard in the bilateral context, and the plaintiffs weren't agreeing to it in the global context.

Q. I understand that. But the point is that by the first week of July, there was $2.6 billion on the table in the context of a non-class action settlement. Correct?

A. [Pausing]

Q. I understanding it wasn't acceptable.

A. Do you mean a bilateral with Fibreboard?

Q. Yes. Continental settling their coverage with Fibreboard. Continental offered to settle it for $2.6 billion. Fibreboard turned it down. But Continental was willing to pay that without the necessity of a class action. Right?

A. That's not true at all.

Q. Well, how am I missing something here? It says in meetings over the last two weeks Continental has indicated its willingness to pay $2 billion for a global settlement or a bilateral agreement with Fibreboard, in addition to the $600 million for existing settlements.

A. You read that correctly.

Q. Were they offering $2.6 billion in the context of a bilateral settlement with Fibreboard?

A. At that time, they were, but that also included a requirement for a class action.

Q. Why would the words say for a global settlement or a bilateral agreement?

A. Because even in the bilateral context they wanted a class action, and they still do, and they still have one. It's called Rudd.

Q. Rudd, right. But it wouldn't have been a class action that would bind plaintiffs, litigants, in the sense --

A. I beg your pardon.

[Laughter]

MR. BARON:

Q. In the sense that they would be required to only seek funds against a trust. They could have gone after Fibreboard under the context of that settlemetn, could they not?

A. I believe that that's what we comtemplated when we talked about a bilateral, yes.

Q. And that's why you didn't agree to it, because you didn't want Fibreboard exposed?

A. I didn't agree to it because it was not enough money.

Q. And because Fibreboard would be left exposed at the end of the road. Right?

A. Well, that's one of the ways you determine how much money you need.

[Laughter]

MR. BARON:

Q. Now, this particular settlement, Ahearn, is worth $3.35 billion, thereabouts?

A. I believe that that is a rough estimate of what comes out of this, yes.

Q. All right. On July the 9th, 1993, Continental had offered $2.6 billion. What was your demand in terms of a bilateral then, without the necessity for doing a (b)(1)(B) non-opt-out mandatory class for plaintiffs?

A. I think it was -- I think it ws the five or six hundred million dollars apart from this.

Q. Sounds like they should have taken it.

A. Asbestos is a funny litigation, isn't it?

[Laughter]

MR. BARON:

Q. So you would have been willing to enter into a bilateral settlement with Continental in July for a little over $3 billion, a little over a hundred or two million over $3 billion?

A. 3.2 or something like that.

Q. And if you had been able to obtain tha settlement, you would not have required the plaintiffs' bar to enter into the mandatory non-opt-out settlement. Correct?

A. That depended whether they wanted to do a settlement with Fibreboard or not.

Q. Sure. You wouldn't have required it, but if they had wanted to get their percentage, they sure could have done it, couldn't they?

A. What is that supposed to mean? I don't understand that question.

Q. All right. I'll pass on, if you don't understand that one. Now turn with me to the document that

Testimony of Stephen Snyder, Fibreboard counsel Tr. 610-611

Q. When was it done?

A. It was done in Dallas. And it was reported about a week before it was --

Q. You're absolutely right.

A. -- approved.

Q. Under the terms of the Ness Motley settlement, Ness Motley settled what, about 45,000 cases or so for themselves and their affiliates?

A. There were about 45,000 cases, when all was said and done, in the Ness Motley renegotiated three-party agreement.

Q. And the renegotiated Nes Motley three-party agreement called for a payment of 50 cents on the dollar for the claims, and the other 50 cents on the dollar to be paid when?

A. On the occurrence either of a coverage on Fibreboard prevailing in its coverage cases, on the negotiation of a resolution of the coverage cases or upon the occurrence of a global as that was defined in the agreement.

Q. Well, in terms of the resolution of the coverage cases by the courts, that was somewhere up in California, intermediate appellate court?

A. It could have been done by settlement.

Q. That was the second way to do it, by settlement?

A. Yes.
Q. And the third way to have done it would have been by entering into a global settlement?
A. Yes. But when you say it was in the appellate courts, it was in the appellate courts with the possibility of a decision this year. There was always the possibility also of time in the Supreme Court.
Q. Still hasn't been decided today, has it, 1994, a year later?
A. In the appellate court, it has been.
Q. But not in the Supreme Court. Hasn't even been set for argument yet, has it?
A. The Supreme Court has -- the coverage case?
Q. Yeah.
A. I believe that the coverage case is being held in the appellate court, at least part of it, until the appellate court learns whether we've been successful in settling our differences here.
Q. Mr. Snyder, what was the value of the Ness Motley agreement that was entered into in August of '93?
A. Well, if you -- if you don't count the zero-pays that will work their way into the system as

Testimony of Stephen Snyder, Fibreboard counsel Tr. 616-618

again, of Pacific Indemnity, was that only Ness Motley has reached resolution of the present cases or has a written agreement in place that would provide guidelines or resolutions. And at the top of the next page it says: Judge Higginbotham was making it clear to us that Pacific Indemnity might attack the negotiations as being improper because of the existence of attorneys negotiating their presents and their futures?
A. No, I don't. I've got to make it clear that Fibreboard had a contract with Pacific Indemnity, the second Pacific settlement that basically kept Fibreboard out of the discussions as they

related to whatever pressure was being brought to bear on Pacific. And I note from the date that it was bout this time that it was happening, to bring them into the negotiations.
Q. Turn to tab 32, if you would. This is a memo dated August 20, 1993, that came from Mr. Sweeney's file and was identified by him in his deposition. He says his memo of August 20, 1993, when -- after he had been appointed to be a negotiator of the global settlement by Judge Parker -- that he received a call from Peter Coleman, who is in charge of settlements for Fibreboard. Who is Peter Coleman?
A. He's a lawyer with Fibreboard.
Q. Okay. In his memorandum, he states, "He, talking about Mr. Coleman, indicated that Fibreboard is most anxious to resolve the inventories of our office, Steve Kazan's office, and Harry Wartnick's office." Did you talk to Mr. Coleman about getting all of the cases, the inventories of class counsel settled before the deal was done?
MR. MILLER: Excuse me, Your Honor. By its terms, that particular question as phrased violates the attorney-client privilege. We object.
THE COURT: Do you want to rephrase, counsel? I don't recall all of it.
MR. BARON: All right.
Q. Mr. Snyder, was it Fibreboard's intention to try to get closure on Mr. Sweeney's cases., Mr. Kazan's cases, Mr. Wartnick's cases before they came to closure on the global settlement, specifically during the week of August 20th?
A. I seem to recall that at one point -- I don't know when -- this was about the time Professor Green got involved or not, or whether it was after that, it was discussed that he class counsel should make an effort to settle up whatever cases they had remaining or to complete settlements before any global was completed. I think that the fact of the matter is that that is -- on reflection, we all realized that that --under normal circumstances

and some other litigation might be a desirable goal, but it was an unworkable goal in the asbestos litigation.

Q. And why was that?

A. Because cases are coming through the system all the time. There are lots of cases, I think, that the Ness Motley people had some responsibility for in the present inventory that we just didn't join the Ness Motley deal. And not only did we not settle their cases, but we didn't negotiate to settle their cases, but we didn't negotiate to settle their cases. And they had affiliate relationships with law firms that probably required them to come in and try a case if the case went to trial. They didn't have responsibility for settling cases, as I understood it. There was no way that we could do something like this. We were either going to settle those cases or we weren't. And so we have to understand that even

Testimony of Stephen Snyder, Fibreboard counsel Tr. 621-623

A. It applies the Nicholson curve out of his article without analysis of the Fibreboard cases. And it takes the CEC data for what it is.

Q. All right. And under -- using that data and only going out to the year 2017, it projects 27,3332 future fillings, does it not?

A. If you extrapolate from one year, that's the kind of result you get.

Q. All right. Now, Mr. Snyder, you have previously testified that you believe that it is more likely than not that if the global settlement is ultimately disapproved, that Fibreboard will have adequate funds under the trilateral settlement agreement. Correct?

Mr. MILLER: I object to that.

THE COURT: The court heard the testimony. The court will recall it.

A. What was your question?

MR. BARON:

Q. Is it more likely than not, in your opinion, that if the global is disapproved that Fibreboard will continue to operate indefinitely and pay its liabilities pursuant to the trilateral settlement?

A. If Fibreboard doesn't get the global, if the global is not approved and the trilateral is, I think

that Fibreboard probably can use those funds to stay viable, but that in order to do so it will have to achieve settlement values of less than half of what it's paying now under the assignment system, and it would have to spend a very substantial amount of that money, perhaps even more than half of it, on defense costs. That was the burden of the charts that I have in my materials under tab 1.

Q. Yes, I've reviewed your charts.

A. And I also -- by the way, in the deposition passage that you quoted, you didn't quote the material where I said I thought there was a grave risk that Fibreboard wouldn't be able to do that. And I think that should be clarified as well.

Q. Well, in the deposition, the question was asked of you by Mr. Golan: Does that mean you think it is more likely than not that if that were to occur, that being global disapproval, Fibreboard could defend, and to the extent necessary pay the future claims within the roughly $2 billion provided under the trilateral?

Answer: Yes, that's what that means.

That still is your testimony today, is it not, sir?

A. In the context of everything else I said in the deposition, yes.

Q. Okay. Does Fibreboard have any present plans to go into bankruptcy, to you knowledge?

A. Not to my knowledge.

Q. If the global is disapproved and the trilateral is approved, do you foresee a Chapter 11 filing for Fibreboard?

A. That's beyond the scope of my responsibilities for Fibreboard.

Q. What tax benefits, if any, will accrue to Fibreboard if the global settlement is approved?

A. [Pausing]
Q. Do you know?
A. I'm not aware of any tax benefits that will accrue to them.
Q. Are there still other insurance coverages that might be available to -- strike that.

Has Fibreboard resolved any insurance -- any other liability insurance policies for purposes that would be asbestos-related policies -- boy, it's getting late in the day. I'll start over.

Mr. Snyder, does Fibreboard have any funds available to it from the liquidation of other insurance policies that were intended to cover

Testimony of Harry Wartnick, class counsel Tr. 643-646

Q. And is your memory of those events consistent with Mr. Snyder's testimony?
A. Yes. I was viewing it from the opposite side, but, yes, it is consistent.
Q. I would like to call your attention then to the -- may I withdraw that, Your Honor?

You also have heard testimony from Mr. Snyder, have you not, on the subject of Fibreboard's litigation with its carriers?
A. Yes, I did.
Q. Did you follow that litigation
A. Yes, I did.
Q. And were you aware of the status of that litigation as we approached the year 1991?
A. I've been generally aware of it since the mid-1980s. I actually attempted to intervene a plaintiff into the litigation back in 1983-1984, sometime in the general time period, and I have followed it generally ever since.
Q. How did you follow it, sir?

A. I was in San Francisco, I paid attention to what was going on at the courthouse. When the various tentative decisions came done from Judge Brown, I obtained copies of it. We obtained copies of the judgement. And when the case went up on appeal, we obtained copies of the various briefs and generally made an effort to keep abreast of what was occurring.
Q. Let me call you attention to the beginning of the year 1991 and ask you if you can briefly describe for the court how, as you observed them and lived them, the negotiations that became ultimately the Ahearn settlement began.
A. My first involvement that I can recall is receiving a telephone call from Mr. Snyder, either in very late 1990 or early 1991, suggesting that the type of settlement negotiations that we had been engaged in the San Francisco Superior Court could perhaps provide a model or a method by which cases could be settled on a larger scale nationwide. And he wanted generally to know if that is a subject that I felt was worth exploring. I indicated to him that I thought if probably was.
Q. And briefly describe for the court what steps were taken from your side of the table thereafter.
A. Mr. Kazan, who I think also received a similar call, and I met with Mr. Snyder and Mr. Levin, I believe it was a Saturday morning, at the Hyatt Regency in Hyatt Regency in Oakland, sometime in mid-January. We then discussed the matter among ourselves and shortly thereafter contacted Ron Motley, after we had come to the conclusion that if something such as this was going to be done, certainly Ron and his firm would have to be involved if it were to be successful. We met with Ron. I think our first meeting in person was in San Francisco. And between us, we agreed that this certainly was a subject that should be considered further.
Q. Stopping there, Mr. Wartnick, what was the consensus of the group based upon? Why did you think it was a subject that should be considered further?

A. My biggest concern, I think all of our concern from the outset was the conditional nature of Fibreboard's insurance coverage. They didn't have any at that point that was in place, or effectively didn't have any in place other than the little bit they had from the interim agreement with CNA. And we knew that they had one what could be tremendous amount of insurance coverage from the trial in Judge Brown's courtroom. But that was not in place at that point and was subject to appellate review, both at the court of appeal level and the Supreme Court level in California. And that indeed if Fibreboard did not succeed in having affirmed the basic judgment that they have, we did not feel that Fibreboard had adequate resources to remain a viable entity.

Q. What was the proposition that you and your colleagues intended to pursue?

A. We intended to pursue a settlement with Fibreboard on an assigned -- initially on an assignment basis, and then as we started looking at it more carefully, it was clear that for the pre-1959 -- for the post-1949 cases an assignment was not an appropriate way to go, and that eventually became a straight negotiation with them.

Q. Once you decided to go forward, describe briefly for the court what were the next steps taken.

A. We very early on decided that having dealt with the Brobeck firm in the past that while I certainly felt very comfortable in litigation or negotiations with them in a personal injury context, that this type of negotiation and proceeding would involve far more than that in terms of commercial litigation, insurance class action and tax issues, amongst others, and that I felt I did not have personally the expertise to adequately represent the interests I would be representing in that type of negotiation with Brobeck. And we agreed that we wanted to retain counsel and we contacted you at Caplin & Drysdale and we eventually retained you.

Testimony of Harry Wartnick, class counsel Tr. 649

proven to be -- to come the closest to what the actual experience had been

Q. Mr. Baron and others have made a great deal of the fact that at this stage in negotiations it was contemplated that any settlement would be on an opt-out-Rule 23(b)(3) basis. You've heard all of that testimony?

A. Yes, sir.

Q. Is it correct that at this time that's what was comtemplated?

A. Yes, sir.

Q. Why was that?

A. Couple of reasons. First of all, given a choice, I would rather give a member of the class the ability to opt out, in lieu of presenting it, if that could be done. I think that's probably preferable to the victim, if it's available.

Second, legally, I felt, and I think the group felt that it would be easier to support an opt-out class in light of the jurisprudence then available.

Q. And did the group then proceed to negotiate with Fibreboard on the basis of potential class action settlement?

A. Yes, we did.

Testimony of Harry Wartnick, class counsel Tr. 685-688

Q. Okay. You can't testify one way or the other on that, can you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. I wouldn't. I certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process, that is correct.

Q. Okay. In other words, but for an agreement with Fibreboard, you would not have participated in a class action litigation against them; is that right?

A. I had no intention to file a litigated class action against them throughout this process, that is correct.

Q. All right. Now, in the event, however likely, that the global is disapproved by either this court or by another court, do you contemplate that this case will be dismissed?

A. I believe that applications will be made to the court to dismiss this action by Fibreboard and others. Whether it's actually dismissed is up to the court.

Q. Will you contest those motions to dismiss?

THE COURT: What does that have to do with any decision this court has to make?

MR. BARON: Mr. Wartnick knows. Your Honor, it goes to Article III, Section 2 of the Constitution, the power of this court at all to prosecute this case, if indeed this is a case.

THE COURT: The court has some passing familiarity with Article III. I see no relevance whatsoever to that line of questioning. Go ahead.

MR. BARON:

Q. Mr. Wartnick, if the global fails and Fibreboard moves to dismiss the case, will you oppose it?

A. That depends on the circumstances at the time.

Q. What circumstance might be there that would require you to oppose it? Can you think of any?

A. Fibreboard or the insurers act in bad faith, I will certainly oppose it. If such a motion is made, I will consult with

counsel and with the other class counsel and will make an appropriate determination at the time.

Q. Mr. Wartnick, you and your firm have represented asbestos victims for what, 15 year or so?

A. Approximately.

Q. And during that 15-year period, have you had clients come to your office complaining that they were exposed to asbestos-related disease?

A. Yes.

Q. And, Mr. Wartnick, is it your practice to file lawsuits for clients who were exposed but have no asbestos-related disease?

A. Usually not.

Q. And, Mr. Wartnick, in the open market of asbestos litigation, do you believe that a case involving an individual who has been exposed to asbestos disease but who has no present injury of any kind of character is worth $50,000 in settlement?

A. I have no way to answer that. There are certainly medical monitoring decisions --

Q. Let's exclude medical monitoring.

A. In California, I'm not sure that I can, in answering that.

Q. Okay. Well, I'll ask you the question in a jurisdiction that does not have medical monitoring. Is a claim that an individual has been exposed to asbestos but has no present disease at all of any kind or character a case that in good faith is worth $50,000 for settlement purposes?

A. I would not expect to receive $50,000 in settlement today on such a claim.

Q. all right. Mr. Wartnick, how many medical monitoring class have you filed for asbestos people who have been exposed to asbestos?

A. Personally, I have filed none.

Q. Thank you.

Have you yourself done any research on whether or not the trilateral is adequate or inadequate to pay all the remaining claims against Fibreboard?

A. I don't know what you mean by research. I've certainly given it some thought, and I've looked at some of the materials that have been produced through the litigation.

Q. Do you have information as to the cost of defense of similar defendants such as Fibreboard or like Fibreboard, such as Pittsburgh Corning, what they spend each year?

A. I can't answer as to Pittsburgh Corning. I'm certainly familiar with what Manville spent during 1990.

Q. How much was that?

A. For what, from the first of the year through July or August, whenever Judge Weinstein sustained

Testimony of Harry Wartnick, class counsel Tr. 691-693

reaching this settlement were that there would be approximately 175,000 to 185,000 claims in the future; is that correct?

A. I think the number I used was about 186,000

Q. Okay. So the settlement that you reached in Ahearn was based on your assumption that there would be 186,000 claims or so in the future?

A. Yes, sir.

Q. Okay. And if it turns out there's less, you've made a particularly good deal, in your mind; and if it turns out there's substantially more, it might not be such a good deal. Correct?

A. No, I don't agree with that at all. Given the option of the reversal of the insurance coverage case and Fibreboard having nothing more than its net work available to asbestos victims, I do not agree with that at all.

Q. Did you hear Mr. Snyder testify that he thought that the trilateral settlement was good enough that if the global fails he

would have preferred that to a litigated result and a litigated win in the insurance coverage case?

A. Yes.

Q. And do you agree with him?

A. I am not -- if you're asking me to compare the trilateral with a full win for Fibreboard --

Q. Yes.

A. -- in the insurance coverage case?

Q. Yes.

A. I'm actually not sure which way I would come down on that. I have not given that issue a lot of thought.

Q. If you represented pre- 1959 clients, they would be better off with a full win in the insurance coverage case. If you represent post- 1959 clients, they're better off with the trilateral. Correct?

A. Under what assumption?

Q. Under either assumption. Under the assumption that there's fair resolution. Did you understand my question?

A. No, I didn't.

Q. Let me try it again. Mr. Wartnick, if your clients tomorrow were all pre-'59 cases, they would be best served if Fibreboard won the coverage litigation. Correct?

A. Compared to what?

Q. Compared to the status of post-'59 cases.

MR. INSELBUCH: Object to the for.

THE COURT: Overruled.

A. Is that assuming that there is a Fibreboard win in the insurance coverage case?

MR. BARON: Yes.

Q. Assuming a Fibreboard win in the coverage case, that would most significantly benefit your pre-'59 clients?

A. Assuming the Fibreboard has access to the $360 million in the settlement?

Q. Yes.

A. Then I don't think it makes a whole lot of difference whether they're post or pre-59. I think for $350 million to use for post-1959 claims, Fibreboard would probably be okay.
Q. Okay. So you think that $360 million will cover all of the post-1959 exposure cases a hundred cents on the dollar, just like the other pre-'59 cases would be covered. Correct?
A. I believe that there's a reasonable chance for that, yes. I have not given that issue a lot of thought, however.
Q. Have you given a lot of thought to the value of the pre-'59 future case --
A. To the extent those calculations have been done, I don't have them in front of me or in my mind at this point. I believe that other people will be

Testimony of Harry Wartnick, class counsel Tr. 700

based upon your access to Fibreboard's in-house estimates and expert estimates, you settled on the 186?

THE WITNESS: Yes, sir.

PROFESSOR GREEN: Thank you, Your Honor. One further question.

Q. Do you -- actually, it's two questions. Do you anticipate representing members of the class before the trust if the global settlement is ultimately approved and implemented?

A. Yes. And I'm already doing so with respect to interim claims.

Q. Can you state what your expectation is with regard to the net values received by those claimants as compared to the historical values that your clients have received from Fibreboard in the past?

A. I think that my clients will probably do equally -- in terms of net after cost and after attorney's fees?

Q. Yes, sir.

A. I think they'll probably do better. The attorneys' fees are limited to 25 percent. And the cost of prosecuting the case against the trust will be minimal.

Q. Do you expect to demand from the trust higher

Testimony of Harry Wartnick, class counsel Tr. 703

necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions." Then it says, "As a proximate result of these injuries, plaintiffs, their decedents and those similarly situated to them or some of them have suffered further losses and injuries, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of support, loss of consortium, pain and suffering, emotional distress, loss of life's pleasures and loss of society." Were those allegations made in good faith?

A. Yes, sir.

Q. And does this complaint include a prayer for punitive damages?

A. I actually haven't reviewed it. Could you lead me on that, sir?

[Laughter]

MR. WACHTELL:

Q. Let me read the prayer for relief. "Wherefore plaintiffs pray," and I'm going down to B, "punitive damages from Fibreboard in an amount to be determined."

A. Yes, we did.

Q. Is that a good-faith claim?

A. Yes, sir.

Testimony of Harry Wartnick, class counsel Tr. 706-08

Q. Do you think it's in the best interest of your clients, being their attorney, for the court to approve the trilateral agreement that's set forth in the Rudd class?

A. Yes, sir, very much.

Q. You say that despite the fact that you would prefer to have the global agreement, is that correct?

A. Yes, sir. The alternative is the insurance dispute that's pending before the California Supreme Court right now. And the ramifications that I have discussed earlier, as I know Justice Kaufman has discussed in his declaration of a loss to Fibreboard of even a part of that insurance coverage effectively, in my opinion, renders Fibreboard a candidate for bankruptcy. And my clients and the members of the Rudd are candidates for minimal amount of payments, given the amount of money that Fibreboard already owes.

Q. Do you happen to have my clients who have been exposed to asbestos but have not shown any injury?

A. I've had people who have consulted me under those circumstances. And given the fairly liberal statute of limitations that we have in California, I have simply suggested to those people that they call us again if they are diagnosed with the disease.

Q. And if they call you again, say, 15 or 20 years from now, how do you feel about their chance of being awarded any sum for their injury under the terms of the trilateral agreement?

A. I think probably over a 15- or 20-year period they'll probably be okay.

Q. All right, sir. Mr. Snyder said that members of the team, negotiating team, insisted upon the trilateral agreement. Where you one of those?

A. Absolutely.

Q. And why did you do that?

A. I was very concerned at that time that any settlement or any deal that we made with Fibreboard and the insurers, if CNA

or Pacific Indemnity won at the appellate court level, that given the amounts of money involved here, they would do everything in their power to prevent this proceeding from going forward. We're talking -- I do not mean anything adverse to Mr. Wachtell or Mr. Koplow or anybody at his firm, but with a billion-and-a-half dollars at stake, I was very concerned at that point that CNA and/or Pacific would have an incentive to not pursue this as aggressively as it should be pursued to conclusion. And I felt it was essential at that time to get backup protection for the members of the class. And that took the form of the trilateral agreement.

Q. And you're satisfied that this is a good backup to that?

A. Yes., sir, I am.

MR. COLEMAN: Thank you.

THE COURT: Mr. Wartnick, the testimony the court's heard concerning the amount of the assigned settlements that are out there of 1.3 billion, or whatever it was, do those settlements typically have recourse against Fibreboard in the event, for example, they lost the coverage case?

THE WITNESS: I believe that they do, although I -- I have none of those. I represent no clients who have assignments with Fibreboard, so I may not be the right one to ask those questions to.

THE COURT: My question I assume someone will address then is in the event the coverage case is lost, Fibreboard is looking at a hickey of 1.3 to start with?

[Laughter]

THE WITNESS: I would hope that most -- I would hope, Your Honor, that the plaintiffs' lawyers who negotiated those assignments did obtain Fibreboard's backing behind them. I don't know that

Testimony of George Priest, insurance law expert Tr. 766-772

THE COURT: Who is your next witness, counsel?

MR. ROSENTHAL: My name is Benjamin Rosenberg representing Continental. We call Professor Priest as our next witness.

THE COURT: I would hope we're at a point now, gentlemen, where we can step the pace up a bit. As far as chronology of the negotiating process is concerned, I think that the remaining witnesses can focus on any differences of recollection they might have with Mr. Snyder's testimony, and Mr. Wartnick's. I'm, of course, interested in fully developing the ethical questions and the notice questions.

Professor, do you swear the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Take your seat.

Counsel, I'm very familiar with your witness. I don't need to hear his qualifications. If you wish to file his CV for the record, that would be fine.

MR. ROSENTHAL: Thank you, Your Honor. At this time it's Continental exhibit 6. I move its admission.

THE COURT: Admitted.

DIRECT EXAMINATION MR. ROSENTHAL

Q. Professor, in your resume, can you describe very briefly what your focus has been, both in writing and teaching?

A. My focus has been the study of the tort system and its relationship to the court system and particularly trends in the law over the last 50 or 60 years, including the development of the law in recent years.

THE COURT: While I said I was completely familiar with him, I didn't mean to say I had always agreed with him.

[Laughter]

MR. ROSENTHAL: I understand.

THE COURT: Go ahead.

MR. ROSENTHAL;

Q. And, Professor, is it correct that you have testified as an expert in both tort and insurance matters before other bodies, including courts?

A. Yes, sir.

Q. Have you ever testified as an expert about California insurance matters?

A. Yes, sir, I have.

Q. And is it correct that you have testified before the California Department of Insurance on three occasions?

A. Yes, sir.

Q. And also before the Insurance Commissioner in consolidated hearings on at least one occasion?

A. Yes, Sir.

Q. And also before a select committee of California legislature, also in California insurance matters?

A. Yes, Sir.

Q. And have you testified in other fora on insurance matters also?

A. Yes, in various states and also before Federal Congressional committees.

Q. Do you have any experience in class actions, Professor?

A. Yes, sir, I do.

Q. Can you please describe that, very briefly?

A. Yes. I've served for the past years as a special master in a large ERISA litigation in the district of New Jersey, I was appointed by Judge H. Lee Sarokin.

Q. Is that McClendon v. Continental Can?

A. Yes, it is.

Q. Through your teaching and work, have you studied the comprehensive general liability insurance policies?

A. Yes, sir, I have.

Q. Can you describe briefly what your study of those has entailed?

A. Well, anyone that writes in the torts of insurance area has to, especially when you're dealing with property-casualty insurance and business risks, has to deal with the comprehensive general liability policy. But I teach insurance, too, at Yale Law School; and my classes have been devoted in part to studying that policy and its development over time.

Q. In your classes, have you studied the California Supreme Court's approach to insurance matters?

A. Oh, yes. Yes, sir.

Q. Can you explain how it is you've come to do that?

A. The California Supreme Court has been a leading court on torts and insurance issues for a long period of time, surely since the '50s and '60s, through the '70s and '80s, so it wouldn't be much of a class if one didn't devote some time to California cases.

Q. Did there come a time when you were retained by Continental and Pacific in this matter?

A. Yes, sir.

Q. When was that?

A. I think the first call was in April of this year.

Q. And what were you retained to do?

A. Well, I was asked to look at these coverage cases and look at California law and develop some valuation of what the likelihood was or is that the California Supreme Court might overturn the court of appeals or Superior Court rulings in these cases.

Q. Can you describe briefly what materials you've reviewed in connection with your work?

A. Yes. I've reviewed all the briefs--well, I've reviewed a lot of the briefs in this case, the briefs to the court of appeals and some of the briefs at the Superior Court level, I've of course reviewed the Superior Court opinion, the appeals court opinion and case law in California and in other jurisdictions dealing with these issues.

Q. Approximately how much time have you spend in connection with this matter.

A. Well, I calculated for a declaration, I think it was 140 hours at that point. Obviously there's been some more time traveling here.

Q. Now, have you formed an opinion, Professor, about the magnitude of the risk that's facing Fiberboard in the coverage case that are now pending in the California court?

A. Yes, I have.

Q. And can you please state that opinion?

A. I think that there is a significant risk, a real possibility, a real chance that the California Supreme Court might overturn the Superior Court or the court of appeal on one or more of the issues before it. That's not to say that it's an obvious case or a slam-dunk proposition, but I think there's a very significant risk that one or more of these issues might be overturned.

Q. And do you have an opinion as to which issue is most likely to be overturned.

A. Yes, I do.

Q. And what is that?

A. I think the scope issue and the trigger issues are those that are most likely to -- to be overturned by the California Supreme Court, though again when I say most likely, I don't want to say that I -- that I would guarantee or that anyone could predict to a certainty that they would be overturned, but I think the greatest chance and a very significant chance exists for reversal on those issues.

Q. Professor, I'd like to direct your attention to August 27th or 1993, and ask you whether you formed an opinion whether as of that time it was a significant risk that the California court, Supreme Court, if presented with the issues, would rule in favor of the insurers.

A. Yes, I did form an opinion based -- I understand the importance of that date, and what -- I have formed an opinion about the chance of a reversal as of that date.

Q. What is that opinion?

A. It was the same opinion. I think that there is or was on that date a significant risk that one or more of these issues might be reversed by the California Supreme Court.

Q. Now, could you state, sir, what factors briefly led to your conclusion?

A. Well, two -- two general -- put in the most general way, two factors:

The first is that there has been a trend in the laws in other jurisdiction, but also in California to reverse the direction of expanding

Testimony of George Priest, insurance law expert Tr. 794

CROSS -EXAMINATION BY MR. INSELBUCH

Q. Your view is that the greatest risk of reversal was in the area of scope and trigger, is that correct?

A. Yes, sir.

Q. What would have been the effect to the asbestos plaintiffs had the Supreme Court reversed -- Supreme Court of California reversed on that basis?

A. Well, I haven't studied the claims in detail or the claims pending, so I can't give you a precise answer to that, but it had to be devastating to the plaintiffs, because the coverage that would then be available would have been, as I understand it, largely exhausted. The coverage from Pacific and Continental would have been reduced very dramatically, depending upon what the holding was. Perhaps eliminated entirely. So the effect on plaintiffs would have been very severe.

MR. INSELBUCH; Thank you, Your Honor.

THE COURT: Any other?

Mr. Baron?

BARON: Can I just ask it from here?

THE COURT: Surely

Testimony of Katherine Kinsella, director of class action notice program Tr. 796-814

Ms. Kinsella's testimony. They're before the court and distributed to all parties, Continental exhibits 7 through 13. We move them in evidence.

THE COURT: Any objection? Admitted.

DIRECT EXAMINATION MR. BOFFA

Q. Ms. Kinsella, how are you currently employed?

A. President of Kinsella Communications.

Q. Are you also a senior consultant at the Kamber Group?

A. Yes, I am.

Q. What degrees do you hold?

A. Bachelor of arts in English literature and education, and a Master's degree in English Literature.

Q. After you received your master's degree, did there come a time when you went to work for the Kamber Group?

A. Yes.

Q. What is the Kamber Group?

A. It's a very large public relations and communications firm based in Washington, D.C.

Q. What was your position with the Kamber Group?

A. When I started, I was a senior associate.

Q. And, very briefly, what were your responsibilities?

A. I handled clients in the marketing, advertising and public relations area.

Q. And did you then become director of public affairs?

A. Yes, I did.

Q. And what did you do in that position?

A. I had oversight responsibility for the public relations, marketing, advertising, direct mail and event management for the firm.

Q. Did you then became a director of marketing and advertising?

A. Yes, I did.

Q. And your responsibilities there?
A. I directed all the advertising work the firm was engaged in, and all the marketing work.
Q. What experience did you have in designing legal notice plans while at the Kamber Group?
A. I designed the bar notice for the Manville Trust that provided notice to the health claim and creditors class.
Q. When you say the health claim and creditors class, what kind of claimants were they?
A. They were asbestos health claimants.
Q. Was that a national notice plan?
A. It was both a national plant and a Canadian plan as well.
Q. Did there come a time when you left your position as director of marketing and advertising at the Kamber Group to start your own company?
A. Yes, correct. I left about four years ago.
Q. Is the company that you started consulting communication?
A. That's correct.
Q. What is the business of consulting communication?
A. I specialize in marketing and advertising work, but for the past few years I've been primarily doing class action notice work.
Q. Were you in fact involved in the design and implementation of the notice plan in the Georgienne against Amchem Products class action?
A. Yes, I was.
Q. Very briefly, to whom was the Georgine plan directed at?
A. To asbestos health claimants who were exposed occupationally to asbestos.
Q. Were those present claimants or future claimants or both?
A. They were future claimants.
Q. Was that as well a national notice plan?
A. Yes, it was.

Q. Did there come a time as consultant when you were retained to develop dissemination plans in the Ahearn and Rudd class action?
A. Yes, in January of this year I was retained.
Q. What specifically were you asked to do?
A. I was asked to prepare a plan for national and international notice and to be available to implement that plant if it were approved by the court.
Q. Did you in fact design notice plans for the Ahearn and Rudd actions?
A. Yes, I did.
Q. Who were the Ahearn and Rudd notice plans designed to reach?
A. Two classes: The health claimant class and a third-party class.
Q. Very briefly, what is the relationship between the Ahearn notice and plan and the Rudd notice plan?
A. It's essentially the same plan. They were done -- it was one plan, one media outreach to reach both classes in both class actions.
Q. Is that because the classes in the Ahearn plan and the analogous plan in the Rudd plan are substantially the same?
A. Yes, sir.
Q. In designing the notice plans in Ahearn and Rudd, did you seek to provide notice both to the general public at large as well as to specifically-targeted groups that were likely to contain class members?
A. Yes, I did.
Q. In designing the notice plan in Ahearn-Rudd, how were you able to identify target populations to whom you would be directing notice?
A. I prepared a database with material that was provided to me by Fibreboard. I looked at works -- alleged work sites for cases that were paid and were pending against Fibreboard and its insurers, I looked at all the cases that had been filed against Fi-

breboard and its insurers throughout the country and I assigned them to geographic areas so that I could target my media to reach those areas where I thought it was most likely to find significant numbers of people who were likely to have been exposed to Fibreboard products.

Q. In that process of doing additional research, did you also identify relevant products and manufacturers, occupations, known claimants as well?

A. Yes, sir, I did.

Q. Did you then evaluate certain methods that would best reach the targeted populations that you had identified?

A. Yes, sir. I looked at -- established a -- several target demographics. One was primarily men occupationally -- blue-collar occupationally employed, 45 years of age and older; and I also look at other demographics which would be appropriate for the members of their families, and I established the vehicles that would be best to reach them.

Q. So in fact you were able to select certain methods that would use in the notice program to best reach the target population that you have identified?

A. Yes, sir.

Q. Did you create written description of the notice plans for the Ahearn and Rudd actions?

A. Yes, sir, I did.

Q. And where those submitted to the court?

A. Yes, they were.

Q. And what action did the court take? Do you know?

A. They approved the materials.

Q. After the court approved the notice plans, what did you do?

A. I began to implement the program, I required the printing of the materials, the purchase of the paid media, and the translation of the ads -- the advertisement notice into nine different languages, and the negotiation with the media vehicles, publications, television stations, to accept the advertising.

Q. You mentioned television stations. Implementing the notice plan, television advertising was used as well?

A. Yes, sir.

Q. Was the television advertising done all at once, or was it done in stages?

A. It was done in two what we call flights.

Q. How many advertisements or television notice advertisements were in the first flight.

A. The first flight was a national advertising thrust. We were on broadcast network and cable, we ran approximately 176 spots on that, and 48 spots on network Spanish -- Spanish networks.

Q. when you say Spanish networks, do you mean Spanish language television network?

A. Correct.

Q. How many ads were run in the second flight of the television notice?

A. The second flight was targeted to specific geographic areas where, as I described before, we believed there was a likelihood of a lot of individuals who may have been exposed to Fibreboard products. We targeted 72 me media markets and we ran close to 3,000 spots.

Q. When you say "spots," you mean --

A. Television advertisements. 30-second television advertisements.

Q. What did the 30-second television advertisement say?

A. It told people that there was -- that there were class action lawsuits pending against Fibreboard and if they were either a health claimant class member or a potential third-party class member, and brief descriptions were given of those two classes, that if they thought their rights would be affected by this and they though they might be a member of this class, that they should call the 1-800 number for a complete information package.

Q. You said there was an information package. What was the information package?

A. It had three components:

There was the Rudd notice

The Ahearn notice

And there was also an overview booklet that contained approximately 60 questions that health claimants or third-party claimants might ask about the settlement and the class actions. And it was an attempt to try and put this in layman's language so people could understand very clearly what the notice was about.

Q. How many people have called the 1-800 number requesting notice packages?

A. As of last Thursday, approximately 530,000 people have called either the English-speaking line or the Spanish-speaking line.

Q. So you had a separate Spanish-speaking line with Spanish-speaking operators?

A. Correct.

Q. Are you able to estimate the percentage of the general public that was reached by the televised notices alone?

A. When you combine both the national buy and the spot television buy, about 94.2 percent of television households were reached or exposed to the message, approximately, or at an average of about 5.1 times.

Q. You said television households. What percentage of households in the United States, approximately, have television?

A. 98.2 percent.

Q. So we're talking about a very high coverage?

A. Extraordinary reach.

Q. Was advertising in newspapers used as well?

A. Yes, it was.

Q. What did the newspaper -- it was a notice ad?

A. Yes.

Q. Is that a fair way to describe it?

A. [Moving head up and down]

Q. What did the notice ad in newspapers consist of?

A. Full-page ads that basically explained the two class actions, gave the critical points of information regarding settlement;

it informed people what their rights were regarding these two class actions, gave them a 1-800 number and a coupon to respond for more information.

Q. And that was the same 1-800 number that was in the television ad?

A. Yes, that's correct.

Q. Or the same two?

A. Well, actually, there was a 1-800 number to call for information regarding this fairness hearing. But we only published the English-language number in the English-speaking and the Spanish in the Spanish-speaking.

Q. Was newspaper advertising also done in two stages?

A. Yes, it was. We did more of a national campaign the first time. We were in 286 newspapers in approximately 151 media markets throughout the country. The second phase we targeted once again those 72 markets where we believed we would most likely find significant number of people who had been exposed to Fibreboard products. That was 72 media markets. We were in approximately 171 newspapers in those markets in the second flight.

Q. The 72 targeted markets again were the same 72 as in the second round of the TV ads?

A. That is correct. And they ran simultaneously, the newspaper and the television.

Q. And you based your selection of the 72 markets on the sort of reach which you described earlier in your testimony?

A. That's correct.

Q. You mentioned that the notice was translated into nine foreign languages, is that correct?

A. That is correct.

Q. Was the newspaper notice published in foreign newspapers?

A. Yes, it was.

Q. Can you tell us how many?

A. We are still trying to verify in a few places like Palau, P a l a u. Don't ask me where it is?

Q. You don t know where it is?

A. No, no, it's in the South Pacific. I have verified --

THE COURT: Hotbed of Fibreboard activity.

[Laughter]

A. No stone was unturned. I verified about 32 newspapers. We targeted newspapers in 23 countries. I know, even though I haven't verified all of them, that many of the newspapers were - ads were placed because I've been receiving coupons from these places.

MR. BOFFA: Your Honor, I might add that to the extent that we obtain further confirmation either with respect to placement of advertisement in foreign newspapers or the actual --

THE COURT: You can file those when we reconvene on the 9th.

MR. BOFFA: We'll provide that as soon as it's available. Some of the information may not be available till later in January.

Q. Was the printed notice ad also noticed in publications other than newspapers?

A. Yes, it was. We published the notice in Parade magazine and USA Weekend, which are newspaper inserts around the country. They have a total circulation together of about a hundred million, mostly unduplicated. And also The Wall Street Journal, which was designed to reach third-party claimant class members. We ran it in The Wall Street Journal twice. We were also in Business Week in a full-page ad, and we placed an ad in the American Association of Retired Persons bulletin which reaches 22 million people.

Q. Just referring back to your answer in references to Palau, why, in choosing places overseas, how did you select those places.

A. I looked at the available sales record for products internationally, I looked at where claims were filed internationally, and then because of the type of product that Fibreboard manufactured,

products, in the insulation area, I was informed that they were used extensively in shipbuilding. And I was able to get several volumes of information regarding where the Navy and other marine services repaired vessels in the World War II, the Vietnam War and the Korean war. And it was a very thorough documentation. We targeted all of those areas so that we could reach any civilians who might still be living in that area, who might have worked on, removed or worked on asbestos that had been provided by Fibreboard.

Q. Does Palau fit the category that you just described?

A. Yes, it does.

Q. Was notice provided through any labor or trade publications?

A. Yes. We were in approximately 25 national and international labor publications, and several local ones, with circulation of over 3 million. We were also in trade publications that were selected based on the industries that would have been most likely to use asbestos products. Maintenance industry, asbestos abatement, aviation, construction, et cetera.

Q. Did you also select trade publications that might reach third-party claimant class members?

A. Yes. Some of the trade publications that we used would be reaching both individuals who were health claimants as well as third-party claimants.

Q. So there would have also been legal, medical publications?

A. Yes, that's correct.

Q. How were the union publications chosen, or labor publications?

A. We did an analysis of the kinds of occupations that labor union members would be involved in, and we selected, I believe, 86 international and national unions to whom we mailed notice to leadership quite deeply. We mailed to about five key leaders within each of those national unions, including their general counsel and health and safety officers, as well as president and vice

president. Then to the leadership of AF-CIO state federations, local and state building trade unions, and also to about 14,000 local unions whose membership might have been exposed to asbestos.

Q. If you could try to take pity on the court reported and slow down just a tiny bit.

When you say mailed, were these notice packages that were mailed, or were they advertisements?

A. They were notice packages mailed to the leadership. In reaching -- in negotiating with a number of the unions to mail directly to their membership, we mailed a shorter form of notice which was essentially the full-page ad that had appeared in publications, and it also listed the occupations and products associated with asbestos use. And we mailed that to the individual memberships of seven international and national unions, and they would have a 1-800 number on that document that would allow them to self select and call the 1-800 number if they felt they fit into the health claimant category.

Q. Approximately how many of those notice ads were sent out to union members?

A. Approximately 1.4 million.

Q. Now, there were also, though, advertisements placed directly in union or labor publications.

A. Correct.

Q. Now, you just mentioned direct mailings to union members. What other efforts did you make to provide notice to specific-identified individuals or groups?

A. We mailed the described full-page ad that we mailed to labor unions to about 400,000 veterans, we mailed full packages to about 6500 companies who were either involved in shipbuilding or oil-and-gas refining and exploration, we mailed in the third-party area approximately 30,000 packages which went to longshore insurance carriers, chief executive officers of workers' compensation insurance companies, to all of the co-defendants' entities that were manufacturers, distributors or third parties involved with Fibreboard. We mailed extensively both to third-party class members as well as to health claimant class members.

Q. You mentioned that you mailed out the notice package to approximately 530,000 people who called the 1-800 number. Were there other notice packages mailed out directly to persons you had identified?

A. Yes. We were able to get permission from the court to mail to individuals who called the Georgine 1-800 line and also the list of those who had opted out of that class action. And that was approximately 590,000 names that we mailed. It was some bit of duplication in that, but not extensive.

Q. What about the persons who had worked at sites where Fibreboard asbestos had allegedly been used?

A. We identified about 209 companies where we felt there were a significant number of alleged claims. And we mailed to all of those chief executive officers and we call them up an average of two or three times to try and negotiate usage of their employee list to mail those directly to them. We were able to secure 175,000 names to mail directly to people who were currently employed or who had recently left the company.

Q. Were notice packages mailed to members of asbestos victims groups?

A. Yes. We mailed -- I think we provided 10,000 copies of the full notice package to the White Lung Association, and then I believe we mailed -- we provided them with an additional 31,000 fliers that they distributed.

THE COURT: The court had received as I recall, in letter form, what the court interpreted as a motion from the White Lung Association essentially requesting an extension of time to distribute packets. I'm going on memory now. And the court granted that. Did you have follow-up contact with the White Lung Association? Did they report to you, at least, that they had accomplished distribution?

THE WITNESS: Yes. We requested from them an affidavit or a document that would certify that they had delivered

these. I believe of the 10,000 - 10,000 packages we gave them, I think they delivered close to 9800.

Q. The court had also granted the right to appear to White Lung Association, but to my knowledge they have not appeared. Or no one has identified themselves, at least, from the White Lung Association.

Go ahead.

MR. BOFFA:

Q. Ms. Kinsella, can you estimate approximately how many notice packages were sent out in total.

A. The full notice documents, we distributed more than 1.4 million.

Q. What is the cost of the notice program that you have carried out in the Ahearn and Rudd actions?

A. It is someplace between 18 and $20 million, which includes all the expenses related to providing notice, printing, 1-800- lines, as well as all the paid media.

Q. You mentioned that you were involved in the Mannville notice program. How would you compare this notice program with the notice program that was used in the Manville proceedings?

A. This notice program was, first of all, an

Testimony of Katherine Kinsella, director of class action notice program Tr. 823-824

CROSS-EXAMINATION BY MR. BARON

Q. Hello, Ms. Kinsella.

A. Hello, Mr. Baron.

Q. Do you have a copy of the notice material with you?

A. The package itself?

Q. Yes.

A. I do not.

[Laughter]

MR. BARON: I've got everything else.

PROFESSOR GREEN: You can call the 1-800 number

[Laughter]

MR. BARON: I happen to have one here in the Rudd case, which I think is identical in terms of the [Pausing]--

Q. Ms. Kinsella, I take it that you are familiar, are you not, with the definition of who is in this class?

A. Yes, I am.

Q. All right. I want to ask you some questions about how you targeted certain components of the class to give notice to those people. Among the people included in this class and who would be barred from ever exercising their legal rights to sue Fibreboard are all past, president and future spouses, parents, children and other relatives or their legal representatives of the class members that had been previously defined. What's a future spouse? What does that term mean? Who is a future spouse?

A. I believe that it would be a -- my interpretation of that, when I read it, would be a spouse that was a spouse of a future claimant, not a future spouse.

Q. Were you given information that indeed this class consists of women who 10 years from now might marry asbestos victims?

A. That's a possibility. I wasn't given that information specifically.

Q. So you don't know whether they're members of the class or not? Can you give me an opinion?

A. I think they would be members of the class.

Q. All right. How would you target a woman who might 10 years from now fall in love with a man who happened to be exposed to asbestos 30 years ago?

A. What was the workhorse of this notice campaign was television, both national and spot television. You don't just buy one demographic on television.

Testimony of Katherine Kinsella, director of class action notice program Tr. 831

differ. We do an analysis and know exactly what percentage of blue-collar workers read versus which were light or heavy television viewers. So you hope you've reached these people using many different vehicles in many different way.

Q Do you watch TV?

A. Yes.

Q Do you read the papers?

A. Yes

Q. Up until I asked the question a few minutes ago, you didn't know that women who married asbestos workers in the future were members of this class, did you?

A. I didn't think of it in that terms, but I bought media that would have covered that.

Q. But you sure weren't aware of it, were you?

A. Not specifically.

Q. Ms. Kinsella, let's turn to another class of people here who were targeted. I'm going to give you what really isn't a hypothetical, but I'll call it a hypothetical, because it actually is the truth. About a month ago I had a dentist come into my office, who is a friend of mine, who had just been told that he had mesothelioma. He had forgotten but that during high school he worked as a gofer in a

Testimony of Katherine Kinsella, director of class action notice program Tr. 834-835

that men do that more than women do that or not? You can settle this.

THE WITNESS: I can only testify in my household, and it's true.

[Laughter]

THE COURT: But for those individuals who do flip around, did I understand you correctly to say that you did have simultaneous notices at the same time?

THE WITNESS: I would have to go back and examine the record very carefully from each television station; but I think, yes, there were some simultaneous, but not that many. I would say it was much -- much lower. You have a 24-hour period to run the spots and you're running maybe five channels in a particular media market for seven days. It would be some simultaneous.

MR. BARON: Your Honor, I had one other question on my list I forgot to ask. I apologize.

Q. Ms. Kinsella, how did you attempt to notify children who hadn't been born yet?

THE COURT: Counsel, I expect responsible questions.

MR. BARON: Your Honor, they're members of this class.

THE COURT: That's not a responsible question. You don't have to answer that question.

Any other questions of this witness?

Thank you, ma'am. You're excused

[Witness sworn]

MR. INSELBUCH: If I may, Your Honor, we've had a bit of trouble with our photo duplicating system, but I would like to hand up two exhibits to the court. They are marked Class Plaintiffs 1011 and Class Plaintiffs 1010. The first is Dr. Nicholson's CV and the second is the report that he did render to class counsel. All of these documents have been circulated in discovery and in detail.

THE COURT: Tell me the numbers again.

MR. INSELBUCH: Class Plaintiffs CP 1011 and CP 1010

THE COURT: Any objections

MR. BARON: None

THE COURT: Admitted.

MR. INSELBUCH: May I approach the witness briefly?

THE COURT: Yes, sir.

Testimony of Steven Kazan, class counsel Tr. 903-917

Q. But in general is your memory the same as what you heard testified?

A. Generally, yes.

Q. And if I were to ask you the same question about the time course of the Fibreboard insurance litigation, did you follow that as well?

A. I also followed it. I'm not sure I followed it quite as well as Mr. Wartnick did. But, yes, I was aware of it, read the opinions, read the briefs, kept current on what was going on, talked to people at Brobeck about it and so on.

Q. Let's talk for a minute about the Andres case. What was the Andres case?

A. Well, the Andres case, as the term has been used here, was a group of 124 separate cases that we negotiated with Fibreboard starting in March and concluding in April of 1991 on an assignment basis. 119 of them were pre-'59 cases in which we accepted pure assignments of Fibreboard's rights against Continental; the other five were post-'59 cases in which we accepted pure Fibreboard notes.

Q. Was one of the terms of the settlement a requirement that Fibreboard pursue the validity of the assignment against its insurers?

A. Yes. And indeed that was a term that they -- we insisted that they agree on doing that before we were willing to even negotiate for assignments.

Q. And was that agreement pursued by Fibreboard?

A. [Pausing]

Q. Did they indeed seek to enforce the assignability against their insurers?

A. Yes. They filed a declaratory relief action, I believe, on April 1st of '91.

Q. Was that decided in the California state trial court level?

A. Eventually.

Q. When was that?

A. I believe that the final judgement of the trial court was entered in September of 1992.

Q. And what was that judgement?

A. We won.

Q. Meaning that the assignment was enforceable against the insurer and was reasonable?

A. Yes and no. They brought suit -- Fibreboard brought suit to determine both the right to assign and the reasonableness of the individual settlements. After a year of discovery and machinations and motions and all kinds of things, Fibreboard won the motion for summary judgement on assignability. CNA then offered, as I recall, to stipulate to judgement on that and obtained a court order severing the reasonableness, which was then technically dismissed out of the Andres caption. So the court's decision was on assignability. Fibreboard, in October of '92, filed a separate complaint to adjudicate the reasonableness of the 119 settlements.

Q. What became of that?

A. What became of that was that effectively on the eve of trial, CNA entered into a three-party agreement with us and eliminated the need for that trial.

Q. When was that?

A. Well, the trial date --

Q. Was it before August 27, 1993?

A. The agreement was made then. The trial date was in July of '93, as I recall. We agreed on the deal, there were complexities in drafting the paperwork, and as best I was able to determine, I think the final agreement was in fact signed on September 1, '93. But that was the memorialization of an agreement reached months prior.

Q. Now, during the course of proceedings in the Andres matter, were you aware that there were other similar litigations pending in which other assignment settlements were being presented for approval of the assignability to other courts.

A. Oh, yes, yes.

Q. And who among your colleagues were you aware was also proceeding on that path?

A. Well, certainly I knew of the Ness Motley proceedings, I knew of the Comino proceedings, the proceedings in New York with Weitz & Luxenberg, I believe, the Wilentz firm, Chris Placitella's office was involved, in something similar. I can't cite the chapter and verse at this time. But we were all in full communication.

Q. There was a full program of enforcing those assignments, was there not?

A. There was a full program whereby Fibreboard would seek an adjudication in various courts of the validity of the assignments. They would come up on the courthouse steps and CNA would fold and make a deal.

Q. What was the importance of enforceability of those assignments to you on behalf of your clients?

A. Well, first, on behalf of my clients in the Andres group, specifically, let me put it this way: The whole Andres group came out of a court program in Alameda County where the court, having previously had a backlog and having frozen all the civil litigation except for dying plaintiffs, decided to consolidate some 500-plus cases for trial to clean up the backlog in one fell swoop. And we were gearing up to go to trial on all these cases, as were other lawyers in the county. Other cases in the county. Fibreboard expressed an ability to explore an assignment of these cases. We had a decision to make, which was: Do we make an agreement with Fibreboard and then focus our attention on essentially the Owens-Illinois, Pittsburgh Corning, Owens-Corning group as our targets? Or do we try the cases against Fibreboard, who was, after all, our single biggest defendant, and try to deal with the others? When Fibreboard expressed a willingness to settle, we wanted it to be a meaningful settlement. At this point, the SSP on pre-'59 cases was effectively no longer a viable program. And the one thing we did not want to do was reach some kind of

settlement with Fibreboard that years down the road some court might determine it was invalid and then we would be back having to ask our court to consolidate a new trial on all these cases that had already been tried. So we were only willing to consider an assignment if it truly seemed meaningful. And that's why we insisted on as immediate adjudication as we could get of their right to make the assignment. Because if they couldn't properly make the assignment, it wasn't going to do us any good. That's with respect to that group of clients.

Q. In the context of the negotiations towards a global settlement that were continuing in the 1993 time frame, what was the significance of the decision in Andres?

A. [Pausing]

Q. What was the significance of the decision holding that the assignment by Fibreboard of its rights against its insurers to settle its cases with the individual asbestos plaintiffs had for those negotiations?

A. That was the other part of your previous question. The whole issue of assignment was of critical importance to us in the global negotiations, because at that time, through '91, we were negotiating settlement, the thrust of which was to be an assignment by Fibreboard had the right to do that. That was clearly an issue, we fully expected CNA to raise that issue. And we pursued Andres to a decision because establishing at the trial court level Fibreboard's right to make this assignment, in effect, held the window open to create the opportunity to make a global settlement based on the assignment. If we lost at the district court level -- I am sorry, at the trial court level in Alameda County, I don't think that the people at CNA would have been really worried about Fibreboard assigning its rights to the policy.

Q. You say there was a window open. Did that window close?

A. Well, obviously we made the agreement in the summer of '93 -- we made an agreement in the summer of '93 and a final agreement in December, but in mid-October of this year our ap-

pellate -- intermediate appellate court reversed the trial court, erroneously in my view, Your Honor, and held that CNA had fulfilled its obligations, that Fibreboard had no right to make the assignments and that the assignments were invalid and remanded the case with directions to the trial court.

Q. Was rehearing sought?

A. Fibreboard sought rehearing in the appellate court and it was denied.

Q. Was an appeal sought from the Supreme Court of California?

A. The last I hear, Fibreboard did seek review in the Supreme Court. I don't know that it's been ruled on.

Q. As it turns out, there was substantial uncertainty in the summer of 1993 whether or not Fibreboard was empowered to assign its rights against CNA.

A. There was uncertainty about Fibreboard's right too make the assignment, at least in my mind, from the day they first suggested that in early '91.

Q. Now let me shift your attention now for a moment to the nature of claims that asbestos victims can have. Under the law in California, is a cause of action stated for medical monitoring?

A. Yes, there is. Or one can state a valid cause of action for medical monitoring in the toxic tort/asbestos area.

Q. And is there a cause of action on behalf of those people if the facts support it as well as punitive damages?

A. Yes, you can certainly seek -- you can legitimately plead and seek punitive damages in a complaint for medical monitoring, under California law.

Q. Now, to bring these things to the end of the trail, Mr. Kazan, you were part of the group that negotiated the settlement in Ahearn.

A. Yes.

Q. Do you have a view that you can offer to the court about whether or not you think the Ahearn settlement is fair?

A. Certainly, I do have a view.

Q. Please tell the court.

A. I think it's a very fair settlement, certainly for the members of the Ahearn class.

Q. Why is that, sir?

A. Because in the context that we were dealing with from the start in 1991 and up through the time that the agreement was reached in 1993, just focusing on that period, there was very grave risk involved for members of this class. Fibreboard was a small company that was very important in certain areas of the country and, as Mr. Snyder explained, through the ACF, became increasingly prominent in other areas of the country. It was a company that was effectively swamped by its asbestos exposure. The best illustration of that is this is a company that had around 4 million shares of common stock and at a relevant period it was trading at two, three, four dollars a share. The market was valuing this company at 10 or 15 million dollars when it had assets, as we've heard here, that place it in the 200. 250 million-dollar range, net of asbestos exposure. It had run through most of its insurance coverage, it had left its insurance claims in the California courts and if it lost its coverage, it was all over. If it won its coverage, in my view, it was still all over, but it would have been a slower and more painful death. The risk involved with the insurance coverage litigation was, in my view, very substantial. I don't know that I could have articulated it with quite the elegance of Justice Kaufman, you know, but he was one of the guys at the time who was on the court, and we knew that there was a good result in the trial court, we were optimistic about the intermediate appellate court, although clearly there was substantial risk there, and frankly although we tried not to show it we were scared to death about the California Supreme Court. So there was a very great risk, as we saw it -- as I saw it. There was an opportunity to get a handle on the magnitude of the problem and to reach resolution that would secure adequate reasonable and historically-based compensation for all of Fibreboard's future victims in a system that I thought could work well that would eliminate not only the

insurance coverage risk but also eliminate the risk of further adverse changes in the complexion of the tort system that we've been having to face in California for basically at lest the last 10 years. And all in all, it just seemed to me that this was a very reasonable and appropriate solution to the problem, and in fact an exercise that I was proud to be part of.

Q. One of the terms of the global in Ahearn was a requirement that Fibreboard and its insurers enter into a backup, so-called trilateral agreement, was it not?

A. Yes

Q. And why was that something that the counsel on behalf of the plaintiffs insisted on?

A. We were real scared about what the courts would do in the coverage case. And obviously a loss would be devastating. A win wouldn't be so great either. And we wanted to make sure that the -- that the future class, the future victims would be protected. We knew that there would be attacks made on a class action settlement. That was obvious to us from the very beginning. And not demonstrating any lack of confidence in the Fifth Circuit or anything, but I learned a long time ago that when you go to court sometimes you lose. And we just want to make sure that we were protected and that the victims were protected in the event that a global settlement was not approved. To coin a phrase, it was an insurance policy.

Q. Comparing the situation that the Ahearn class members would find themselves in under the regimen of the global with that under the regimen of the trilateral, which do you think is to their advantage?

A. The global to the trilateral? The global is -- is far superior.

Q. And what is that, sir?

A. Well, a variety of reasons. We think -- and I think it's the general consensus in the plaintiffs' bar, that we've finally got it right, that the trust system and organization of the trust distribution process is very carefully and well designed and will function

very well with adequate input from -- from the victims and their attorneys over time, that it will very efficiently and fairly handle all future claims, and that with quite a high degree of confidence it will be able to pay all future claims in light of past history, and to do so in a very cost-effective way.

The contrast with that is under the trilateral we have a Fibreboard which can call on $2 million plus its equity net worth, whatever you want to call that, to deal with obligations that not only would be owed to future victims but also to a variety of unsettled present cases and other unrelated to asbestos personal injury claims matters. And to put it sort of as nicely as I can, I have been litigating against and with the Brobeck office since 1978 or 1979 with respect to asbestos matters. They are very, very good, they are very, very expensive, but well worth it, I'm sure, to their clients. They have the capacity to really litigate these cases. They can put on a better defense -- I guess the analogy would be a full court press, only they put 12 guys on the court instead of five. And we've seen that in San Francisco, we saw it when they were working for the ACF. we saw it when they came out of the ACF, we saw what they did in our area to drive down the values of cases, and particularly to squeeze virtually all of the value out of the unimpaired types of cases in at least the northern California area. I think that's what Mr. Snyder referred to as to a technology that they were not able to export at that point. It's clear to me that if Fibreboard comes back into the litigation system the Brobeck office will be charged with supervising a national approach and they will see to it that they export this technology. It will get very expensive, they will spend a great deal of the available money on defense, they will reduce the values that are paid to Plaintiffs, as Mr. Snyder promised us he would when he testified yesterday, the net result of which is that a relatively small proportion of that money will ever go to victims. I am confident that they will run out of money. And at some point down the road, it would be my expectation that we would see Fibreboard in a Chapter 11 where they would decide that they had done what they needed to drive

down the values, they no longer wanted to be burdened with just the aggravation of being involved in litigation, with the drain on corporate energy. Aside from hiring lawyers, you have corporate witnesses who get dragged into court, you have document requests, you have a whole infrastructure that needs to be devoted to this. And at some point I think Fibreboard would likely go into a bankruptcy court, say, "We have $500 million left and we don't want to waste it all, so Judge, you whack it up among the victims and let us go on about our business." I think it would be a disaster. But it wouldn't happen as quickly as the disaster would happen if they lost the coverage case.

Q. How long out in the future do you foresee that disaster?

A. Which disaster?

Q. The eventuality that they would run out of money and seek protection under the chapter.

MR. BARON: Objection, Your Honor

THE COURT: Overruled.

A. Under a trilateral.

MR. INSELBUCH:

Q. Under a trilateral.

A. I think they likely would be around for five years. I doubt they would be around for 10.

Q. And if Mr. Snyder were unsuccessful in, as he describes it, exporting the technology and indeed he could not drive down the values of the plaintiffs' cases, what would happen then under the trilateral?

A. Oh, then they wouldn't last five years. My view is that if they hit the tort system, let's say a year from now, by the end of appellate review, they will have however many cases they're going to have

Testimony of Steven Kazan, class counsel Tr. 924 - 925

THE COURT: Let me try to characterize at least my understanding of one other piece of your testimony. If for some reason this court or an appellate court disapproves the class action and the trilateral agreement kicks in place, did I understand you fairly to say that perception in the plaintiffs' bar is such that that will provide also a fleeting opportunity to participate in funds that will not be available for a long period of time and you would anticipate a high level of early filings as a result of that?

THE WITNESS: Your Honor, if this class action flounders and if the trilateral takes effect, it is my opinion that you will see a feeding frenzy among the plaintiffs' bar the likes of which you have never seen, and I have to tell you that I will do my very best to be in the front ranks of that. I'm going to have a hard time getting ahead of Mr. Baron and Mr. Jaques and Mr. Motley, but I'm going to be there, as will every other plaintiffs' lawyer, to do the best they can for their clients, because that's all of our responsibility. The result is going to be a long-term disaster for the future victims, who in that context none of us will represent and with respect to whom none of us will have an ethical obligation to protect. We will have an obligation to protect our present clients. You'll see, if I can put it this way, exactly what you saw in Manville, in the bankruptcy, where the bankruptcy court made clear that the plaintiff's committee was responsible only to the present claimants, that there was a representative for future claimants to whom we had no fiduciary duty. And we all did our job. We did a great job for our clients. And the result was a disaster for the future victims. And you're going to see that again. But magnified.

THE COURT: Were you through, counsel?

MR. INSELBUCH: I was, sir.

THE COURT: Proponents?

MR. WACHTELL: I have a couple of questions, Your Honor.'

THE COURT: Yes, sir.

Testimony of Steven Kazan, class counsel Tr. 930 - 932:

witness or go ahead?

THE COURT: Go ahead.

MR. WACHTELL: I'm sorry, Your Honor.

Q. You referred to the Andres litigation and to the reversal that took place in October of this year, 1994, of the Andres decision. Now, you were aware -- were you aware back at the time of this assignment program that Continental was taking the position with Fibreboard that the assignments were a material breach of the insurance contract?

A. Yes.

Q. Am I correct that in August of 1993 and in December of 1993, you were aware that there was a risk of reversal of the Andres decision by the California appellate courts?

A. Yes. And your question remind me that one of the things that we insisted on is a term of our assignment agreement, and one of the reasons we asked -- insisted that they go to court was a term that if -- if the court said there was no assignability or if the assignability -- if the assignment would vitiate coverage, that the deal was off. We knew we were taking a risk that we could end up with a situation where even if Fibreboard won the coverage case we would lose coverage on Andres -- on the Andres group because of a potential finding that making that assignment was a breach that vitiated the coverage. And that was one of the factors that led to our ultimately agreeing to a three-party settlement with your client.

Q. You heard Mr. Snyder's testimony that the assignment program drove up the values, is that correct?

A. I am pleased to say that we helped him do that.

Q. So that the risks that existed in August of 1993 and December of 1993 that the assignment program as such could vitiate

coverage has, in a sense, now, but for the settlement, come home; -- is that correct?

A. Year. Let me put it this way. One of the things I kept in my -- in our three-party agreement, since I couldn't get CNA to pay for it, was I reserved the right to pursue the bad-faith claim against CNA under the policy that had been assigned to me. Since the Andres decision has come down, I've tried to settle that with your clients and they haven't really been willing to make an offer.

[Laughter]

Q. I can't imagine why.

[Laughter]

Q. What I -- I just want to be clear that you and I are on the same wavelength, Mr. Kazan, and that we have a clear record on this. Were this global settlement to be rejected by the courts and were the trilateral settlement to be rejected by the courts, and if Continental and Fibreboard were back in an insurance coverage mode, am I correct that, as you understand, there would be two problems for Fibreboard to overcome in order to get insurance coverage, the appeals in the California Supreme Court and in the intermediate court of the coverage case and now this new issue as to whether the entire assignment program amounted to such a material breach of contract by Fibreboard that it would vitiate coverage?

A. That certainly is now a major issue.

MR. WACHTELL: No further questions.

THE COURT: 1:30; gentlemen.

[Lunch recess]

MR. KOPLOW: Your Honor, if I might ask the court's indulgence for a moment before the parties proceed with the examination of Mr. Kazan, we had earlier this week mentioned that there were amendments in the offing to -- largely to the trust agreement. And I believe the court is aware that a stipulation of settlement has been reached in the

Testimony of Steven Kazan, class counsel Tr. 939-944:

information that we've obtained in the past with others and would like at least to think that some of the information we provided has been of assistance to those of my colleagues who have nailed you but good in various courts.

Q. Well, okay.

A. "You" meaning Fibreboard.

Q. Certainly. And from that vantage point, Mr. Kazan, would you tell us, please, your views on the propriety of the waiver or elimination of punitive damages in the agreement we're discussing?

A. I think it is at the very least a reasonable compromise and concession on behalf of the future class, with one minor exception that I think Mr. Snyder mentioned. The only lawyers in the country who have ever gotten punitives against Fibreboard are me and Ness Motley. And I just don't think it is a major factor. Fibreboard is not a defendant -- I want to put this delicately in case we're back litigating this issue under a trilateral. The punitive case against Fibreboard is not of the magnitude of the case that exists, for example, against Manville and Raymark and Turner and Newell and Celotex and Owens-Corning and Pittsburgh Corning.

[Laughter]

Q. Very well. To the extent you can, bearing in mind there is some sensitivity about these matters for obvious reasons, can you tell us whether you count yourself as being sort of in the top tier of lawyers with respect to settlement averages with the company?

THE WITNESS: Your Honor being under oath excuses any requirement of modesty?

THE COURT: Truth, counsel.

THE WITNESS: I am sure that my settlement averages with Fibreboard, with the possible exception of some things that might have happened in His Honor's courtroom as a result of certain trials, is well above that of any other firm in the country.

Q. And again considering the perspective from which you speak in that regard, would you comment on the limitation or cap of damages in the agreement we're here to discuss?

A. I think it's again a reasonable thing for the future class to have agreed to. I was going to say given up. But I don't really think it's giving up anything of real import. Mr. Snyder said there have been a dozen cases in which Fibreboard has paid in settlement in excess of $500,000. There are several of those that I could not account for, but it doesn't happen very often. I mean, you can settle what, a hundred, hundred fifty thousand cases, something on that magnitude. It's not a real problem. And by the time you factor in consideration of anything resembling the aspect to the victims, the 500,000 limitation under the trust distribution process and the settlement agreement is really no significant limitation at all.

Q. You were asked a question about medical monitoring. and I want to take you to that for just a second and ask you whether or not it is your understanding in California that you can state a claim for so-called medical monitoring, and if the facts justify it --

THE COURT: Counsel, I think you should develop on the record what medical monitoring is.

MR. MILLER: Yes, Your Honor. That's exactly what I was going to do.

Q. And the first question is: What is medical monitoring?

MR. BARON: Your Honor, I object unless he's referring to a specific state law. Because it is very, very different in the states that have adopted it. And again, as the court is probably aware, many states have refused to adopt it. So we have to limit it to a state.

MR. MILLER: Your Honor, I would be delighted at this point to limit my questions to California.

MR. BARON: Okay.

A. It's been a lot of years since I worried about remembering case names. Published opinions.

MR. MILLER:

Q. There is a case, though?

A. Yes. California law makes it clear that one who has had exposure to a toxic substance with a potential for latent disease resulting from that is entitled to bring a claim for medical monitoring, which is to say appropriate medical surveillance, in the absence of any impairment or demonstrated physical injury. In other words, if it is reasonable under the circumstances, given the substance to which one is exposed, et cetera, medically, then California law permits recovery of the expenses of a medical monitoring program designed to achieve an early diagnosis of the ill-effects of that exposure.

Q. All right. Now, bearing in mind what we've heard about the medical aspects of this situation, is it your understanding that such a claim can be stated even in the absence of any palpable, physical, clinically detectable disease or injury as we would ordinarily think of those conditions?

A. Yes, that's precisely what it means. If there's what you would call a palpable injury or a disability or an impairment, then medical monitoring as we're talking about it is simply an element of medical special damages consequent upon the injury. It doesn't necessarily have to stand on its own. Medical monitoring claim, as I'm using that, is one in which there is no manifested injury, but simply by virtue of the history of exposure it is considered appropriate that there be medical surveillance.

Q. And is it your understanding as a lawyer, bearing in mind the State of California law on the subject, that you could make and indeed do make good faith claims for such damages, in other jurisdictions as well?

A. Well, my practice on behalf of individual plaintiffs is confined to filing suit in California. Or at least it has been up to now. Let me say that assume a history of exposure to asbestos. I think that a plaintiffs' attorney can in good faith, consistent with ethical obligations to clients and the court, file suit against a company like Fibreboard seeking recovery for medical monitoring. And if

we're talking about Fibreboard, it could as well justifiably and in good fath and appropriately allege a claim for punitive damages.

Q. One last topic, Mr. Kazan. That is, did you sometime in 1993, contact Dr. Nicholson to get an update or some corroboration or the like with respect to his projections?

A. Yes.

Q. Would you tell us, first of all, why it fell to you to do that and who you learned?

A. Well, I've known Dr. Nicholson for some years and have a particular -- you know, a particular interest, but I'm sort of a medical junky and I like to read this stuff. In our group of counsel, the sort of primary responsibility early on for dealing with the -- the issues of disease incidence, the kind that Dr. Nicholson testified about, sort of ended up with me. We tended to sort of not rigidly but as a practical matter divide certain areas of responsibility. By virtue of my involvement as a -- first a member of the creditors committee and then an adviser to the trustees in the Amatex trust, which has been wrestling with how to go about paying out money to Amatex victims, we obtained just about every

Testimony of Steven Kazan, class counsel Tr. 948-950:

MR. BARON: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. BARON

Q. Good afternoon, Steve. Mr. Kazan. Excuse me. The case that you were talking about in California, by the way, is Potter v. Firestone? Is that the case that you were talking about on medical monitoring?

A. Well, not exactly. I mean, that is one. I think the other case is Miranda v. shell, which Potter adopts and republished. But, year.

Q. In Potter v Firestone, the California Supreme Court also held that there is no claim or cause of action for an individual to recover damages for fear of cancer or increased risk of cancer in absence of a present injury, is that correct?

A. Well, you're mixing two things. Risks of cancer, certainly. And that has not been recoverable in California. I think fear of cancer may be recoverable in the context of what would amount to an intentional tort.

Q. Right, I'm sorry.

A. Okay.

Q. But in the absence of an intentional tort, it's not a recoverable item, is it?

A. [Pausing]

Q. In California.

A. In the absence of some physical injury, I think you're right, that fear of cancer alone is not compensable.

Q. All right. Mr. Kazan, are you familiar with cases like Ball v. Joy Manufacturing and others sunder the law of other jurisdictions that specifically prohibit claims for medical monitoring?

A. Well, I'm not familiar with that case by name, I know in the Potter opinion it lays out conflicts in the state laws and says that there are a variety of jurisdictions which say no. Some are equivocal, a variety that say yes. It chooses that's the better view. I don't think that's relevant particularly, but there is a split in authority.

Q. All right. So in some jurisdictions there is no cause of action for medical monitoring? You would agree with that?

A. I would agree that if citizens of various states file suit in some states other than California, they may well not be entitled to recover medical monitoring. I would not agree that there are people in the United States who are not entitled to seek medical monitoring from Fibreboard.

Q. Well, Mr. Kazan, you've been handling asbestos claims for years and years and years, as you've described. As of today,

have you ever filed a claim for a victim for medical monitoring that has no injury?

A. No.

Q. Mr. Kazan, as a result of the notice that went out in this case, did you get an increased number of telephone calls in your office?

A. Yes.

Q. About how many?

A. Last estimate I can give you is that we have received, either to the 800 numbers that we set up to handle this or to our office, specifically asking about Fibreboard, about 20,000 calls.

Q. Okay. And from those 20,000 calls, how many cases has your office obtained, new clients?

A. By last count, I'm told that we have filed five lawsuits out of that group, but one of those I don't credit to Fibreboard -- to the Fibreboard notice

Testimony of Steven Kazan, class counsel Tr. 955-957

know if we focused on the distinction between people who weren't yet sick or people who hadn't yet filed a lawsuit. But if you're asking did we know that part of what was involved was representation of people whose claims had not ripened in some sense, the answer is yes. That was always on my mind.

Q. All right. And did you understand as early as 1991 that there was at least a reasonable chance that Fibreboard would not be able to pay all of its future claims to asbestos victims?

A. What do you mean by Fibreboard?

Q. by Fibreboard with whatever assets it had available to it.

A. Well, I certainly knew that if Fibreboard ended up with no insurance, it was already in the tank.

Q. Okay. So you believed from the beginning that there was a potential there that Fibreboard really wouldn't have enough money to pay future claims?

A. That was always a possibility.

Q. Okay. And that was always a possibility from 1991 up through the time that you actually reached this deal in August of 1993. Correct?

A. If not sooner.

Q. Okay. Now, during the same period of time you were prosecuting pending present claims that you represented against Fibreboard. Right?

A. Yes.

Q. Okay. Now, Mr. Kazan, from the beginning of the negotiations in 1991 or at the beginning of the negotiations in 1991, did you have a preference as to what type of a class action for future claims might be utilized, what type of a class?

A. Are you referring to the distinction between opt-out and non-opt-out?

Q. Yeah.

A. Okay. All things being equal, yes, my preference was for a non-opt-out--for an opt-out class in the traditional sense.

Q. Mr. Kazan, in your deposition you told me that until CNA made it crystal clear that the only basis upon which it would pay money was on a non-opt-out basis, that up until that point you wanted an opt-out class. Is that true?

A. That was my preference.

Q. Okay. And so, really and truly, the thing that changed your mind was the opening of Continental's checkbook, in your words?

A. Yeah, when it became clear that a deal could not be made on an opt-out structure and that the only way Continental would put up money for future victims was in a non-opt-out structure, and since my preference was if it was possible on appropriate terms to make a deal rather than roll the dice in the California Supreme Court, I decided that a non-opt-out class action settlement was better than the alternative.

Q. Did Fibreboard explain to you that Continental had offered them some number over two-and-a-half billion dollars in July of 1993 to buy out the policy?

A. I don't know that I knew specifically what the numbers were. I think I knew that they were certainly negotiating.

Q. Well, it was your preference, was it not, from the beginning, to see if Fibreboard could just resolve their insurance coverage without you? Right?

A. Well, from the beginning?

Q. From 1991. You were interested in getting Fibreboard's insurance coverage dispute resolved.

A. Well, from 1979, when the dispute started, I was interested in their resolving it favorably, obviously.

Q. Well, is that why you began these negotiations to begin with, so that you could try to help Fibreboard get their insurance coverage resolved?

<u>Testimony of Steven Kazan, class counsel Tr. 960-961</u>:

don't in any way question Mr.; Snyder's integrity or honesty or anything else, but I think that's a pipe dream. I think that the trilateral is not adequate, I think they could not survive in it and I don't for a minute believe what John Roach said in his letter to shareholders.

Q. Okay. Well, Mr. Kazan, if in 1991, when you were beginning these negotiations, Mr. Snyder had said, "Wait a minute. Let's stop here. Continental has come to us and they've offered us a package that will pay presents and futures $3.5 billion in cash now," would you have backed off going forward with the global?

A. Mr. Baron, you're asking me hypothetical questions about what might have been happening at a point in time. And that's really kind of silly. Fibreboard had been in litigation with Continental since 1979. That litigation continued until the trilateral that we forced them to enter into in August of '93. In 14 years they

hadn't settled the case. Had they been able to settle the case, maybe they would have done it. I know there were times when Fibreboard made demands on Continental for a buyout of the policy, and in retrospect at least those of us on certain sides of this deal are very happy that Continental said no. Had Fibreboard wanted to sell out this policy for 200 million or $500 million, presumably they could have done that. And if they wanted to do it and CNA had been willing to pay it, they would have done it. But it didn't happen.

Q. Okay. What you're saying then is but for you, this settlement couldn't have been reached on the coverage. Is that what you're saying?

A. Well, not just me personally, but for the situation that arose, the opportunities that were created by virtue of the assignment program, the hook that Continental was put on and its realization, I presume, that it was facing growing exposure to paying what it perceived to be grossly inflated dollars on settlements and the prospect it was only going to get worse with a global settlement and assignment that brought Continental to the table, something happened that got the attention of the people who owned Continental and that is what led to Continental coming forward and being willing to negotiate and bring Pacific in that led to this coming together.

MR. BARON: Your Honor, I have a request to make, if I might. I'm sorry to have to

Testimony of Steven Kazan, class counsel Tr. 973-978

would be singled out for a so-called feeding frenzy?

THE COURT: He's answered that at some length.

MR. BARON: He has?

THE COURT: And I don't think you want to hear the answer, counsel.

MR. BARON: I'd like to know the answer, because all of these other defendants who have gigantic coverage --

THE COURT: Counsel, tell him again.

MR. BARON: I don't think he has done it.

THE WITNESS: Okay. The hypothetical scenario that I was discussing is what would happen if in 1996 some appellate court concludes that this Ahearn settlement is for some reason inappropriate but the court approves the trilateral and Fibreboard then -- and presumably at that point the stay that is in place here would be lifted at some date.. What I was trying to explain to you is that on the day that Fibreboard returns to the tort system with a backlog of whatever you guys didn't get filed in '93, '94, '95, '96 filings to face in a context where in the intervening time a lot of cases have been settled in consolidations, whatever you want to call it, where Fibreboard is in cases where they're the only remaining defendant, where judges around the country are looking at a situation where they thought they had their backlogs under control and now they've got 500 or a thousand or 5,000 cases in their jurisdiction, with only Fibreboard left, with plaintiffs' lawyers who are saying," we've had to wait on this, Your Honor," and with Fibreboard sitting there with $2 billion in hand, there will be, I am confident, a rush to the courthouse all over the country, lawyers asking courts to move their cases forward to help them get caught up, to consolidate cases. It's like in the movies, Mr. Baron. If you build it, they will come. Okay?

Q. Okay.

A. If Fibreboard is out there with $2 billion for people to shoot at and people understand the chance that Fibreboard will not continue to be out there because I will look at what you and Mr. Jaques and Ness Motley are doing and they will look at what you're doing and everybody will decide that if they're not there first or quick, by the time they do get there, it may all be gone, there's going to be a rush on that fund. That's a unique situation. Doesn't mean --well, it's happened before. You and I and the rest

of our friends did it to Johns-Manville, to the Manville Trust. Okay? And they didn't have much money. All I'm telling you is that $2 billion floating out there is going to attract a lot of attention.

Q. Mr. Kazan, these would be exactly the same people, would they not, who would be willing claims under Ahearn?

A. No.

Q. So people would come out and file claims against Fibreboard in the tort system that would not otherwise file claims against Fibreboard under Ahearn. Right?

A. Well, I don't know. I mean the proof that is required under Ahearn is significantly larger than that which seems to be presented in many courts around the country in consolidations. If you take a court that says, "Oh, we have 5,000 cases here. We're going to trial and we're going to try liability and a punitive multiplier, because Ness Motley and Kazan have showed you guys how to do this, and we'll pick some representative plaintiffs," then nobody has got to worry about all the facts on all their cases, because not every judge would do what I understand what Judge Parker did and other depositions of every plaintiff. I didn't hear that there were 8,000 plaintiffs' depositions in Baltimore, for example, although there may have been. And so what's going to happen is that there are going to be large numbers of cases, many marginal to worthless, presented in jurisdictions all over the country, and the pressure on Fibreboard to settle, to do something is going to be, I think, substantial. We've seen that with other defendants now recently, you know.

Q. Okay. So what you've done to protect against that is that you've made the requirements of the trust more difficult than the requirements of the tort system. Right?

A. Well, I prefer to put it that the Ahearn settlement requires that people be represented -- well, that if a lawyer comes in with a case, No. 1, he has to really represent the client; No. 2, the client has to have met a doctor.

[Laughter]

Q. And under the tort system that's not the case. Is that right?

A. I'm told that there are some of our colleagues who don't seem to adhere to that formality all the time.

Q. Have you done a study on that, Mr. Kazan? Or is that just your judgment?

A. It's in the literature, it's what you hear from lawyers all over the place.

Q. You just decided you would make it tougher for them under the trust? Keep those kind of claims out of the system. Right?

A. No. Any lawyer wants to present one of those claims, he's certainly free to do it.

Q. In terms of getting compensated?

A. No. If there's a claim and it meets the criteria, it will be compensated. The question of whether a lawyer is going to go to the time and expense of submitting a case that he considers to be so marginal that it's not worth any money under this structure is something I leave to you and your colleagues.

Q. So you think it would be much easier to submit a claim that's not worth any money by filing a complaint, having it served and going through discovery than it would be just to fill out a form and send it in to the trust?

A. I think it's a lot easier to file a complaint with a thousand names in a court somewhere than to file a thousand claims with the Fibreboard trust, yes.

MR. CLARK: I object, Your Honor. It didn't prove too easy at all.

[Laughter and applause]

MR. BARON:

Q. Mr. Kazan, it's a lot easier and cheaper to dismiss a thousand cases filed together in one fell swoop than it is to go through a thousand claims, isn't it?

A. [Pausing]

Q. Mr. Kazan, I'm about finished with you here. Judge Parker commented earlier about the time that you were in his court in Beaumont in the case of In Re: National Asbestos Class Action. Do you recall that? That was back in August of 1990.

A. Well, I can't tell you I remember what the caption was. But that is a day that I think I will never forget, Your Honor.

Q. Mr. Kazan, so that it's memorialized forever, I have a copy of the transcript. And among the things you stated at that hearing were, "I confess to being troubled by any program that would seek in some way to limit or absolve cooperating defendants from potential liability to future claimants." Do you still feel that way?

Testimony of Steven Kazan, class counsel Tr. 1008-1009

action? It makes a difference, does it not?

A. I don't understand what any of this has to do with McDermott.

Q. Well, let's assume that there is a value to a claim of a hundred thousand dollars and let's assume that someone runs through Fibreboard class action Ahearn and gets $10,000 from Fibreboard.

A. Okay.

Q. And then let's say there's a tort action down the line and there's a determination, as you must do under McDermott, of Fibreboard's liability and the jury determines that Fibreboard was 50 percent liable. What's the result? What's the net result to this plaintiff? What's he going to get out of the tort action? Substantially less in a pro rata than pro tanto analysis. Correct?

A. I don't understand what any of this has to do with McDermott. Whatever the state law is, it is. Ahearn doesn't change that. If McDermott applies, it applies whether we're in Ahearn or whether you're not. And I don't think it makes any difference.

Q. Well, let's just do it this way. Generally speaking, leaving McDermott out and dealing just simply with the states, you do acknowledge that there's a difference in treatment in a pro rata jurisdiction than a pro tanto jurisdiction, under the types of scenarios we've been talking about?

A. The treatment of what, settlements?

Q. Treatment of verdicts as there's been a settlement with a defendant prior.

A. I agree that the impact of a settlement with one defendant varies from state to state depending on how that state treats settlements for purposes of offsets against judgments.

Q. Okay. Was there any effort made by class counsel to analyze that issue or deal with that issue in the simple fact that people were going to have different results depending on which type of analysis was performed down the line, pro rata or pro tanto?

A. Yes.

Q. And what was done?

A. What was done was to carefully look at the law of various jurisdictions and to conclude that the fairest treatment here not only for the class but for the third-party class was to preserve everybody's rights under state law under the tort system intact in this settlement. And that is the purpose of the codefendant provisions and that's what happens. In other words, whether Ahearn existed or not, the concerns that you're raising are not impacted.

Testimony of Steven Kazan, class counsel Tr. 1030-1031:

A. Specifically, I don't recall. I know that at least Mr. Cox and Mr. Lockwood have spoken to them. I can't tell you when.

Q. They told me when, and that was in September. Do you have any recollection of anytime prior --

A. Excuse me.

Q. I'm sorry. I apologize, Mr. Kazan.

A. Thank you.
Q. While you were negotiating this settlement, up to the time where you reached an agreement as it was reported in open court on August 27th, to your knowledge, did any member of the plaintiffs' negotiating team talk to or consult in any way with any of the people who are now the class representatives in this case?
A. I'm not aware of whether they did or not.
Q. You certainly did not?
A. I did not.
Q. Okay. Mr. Kazan, in the history of asbestos litigation from day one till today, have you ever been advised by anyone that there has been a recovery of punitive damages in a medical monitoring claim?
A. I'm not aware of any in the asbestos context, but I can't tell you that I'm aware of any cases having gone to trial on that theory.
Q. Okay. In the history of tort litigation anywhere, anyplace, can you, Steve Kazan, ever point to a recovery of punitive damages in any medical monitoring case for any reason, anywhere?
A. If by medical monitoring you mean --
Q. Only.
A. Only? No other physical --
Q. No other physical --
A. I'm not aware of any.
Q. Mr. Kazan, I think I heard you testify that even after August 27th you continued to file cases in court against Fibreboard, is that right, for your clients?
A. Well, yes, that's -- that's not exactly a correct statement. You're implying forever after --
Q. No, not forever after. I'm just talking about after is the word I used. After August 27th, 1993, you continued to file lawsuits for your clients against Fibreboard. Right?
A. Sure
MR. BARON: Thank you.
THE WITNESS: Would you like me to tell you why?

MR. WACHTELL: If you don't ask, I will.

Testimony of Steven Kazan, class counsel Tr. 1037-1042:

started, if somebody dies, you preserve their rights to pain and suffering, under California law, which otherwise would die with them. And I have had cases where that has been a major factor, has been worth hundreds of thousands of dollars to people already in this exigent health program. So I think they're going to get at least as much money even gross, with one footnote. Recovery under Ahearn, as they would under the tort system, the trilateral or normal tort system, they're going to get it quicker. In fact, they're going to do better, because the attorneys' fees are lower and the transactional costs are lower and money costs are lower. Typically, I'll give you a ballpark and say we run three to five percent of the total expense in out-of-pocket reimbursement, expenses, and trials obviously can be much more expensive than that. It's not unusual for us to spend fifty or a hundred thousand dollars out-of-pocket on trial. So I mean all around I think that these people are better off under this deal.
Q. Even though under the global they are capped at $500,000 and cannot recover punitive damages nor interests.
A. Part of that was the footnote that I mentioned as I was going through that answer. Punitive damages -- to the extent Fibreboard is at risk, and that has been a factor in the settlement of their cases, that is captured in the historical data and averages that we all have, which is to say if they've been afraid of me or Mr. Baron or anybody else, that we're going to get them for punitives, and they have subconsciously paid a premium on that for that extra risk, then it's in the data and it's in the historic averages. The giving up of punitive damages I think is not a big issue, because almost no one has gotten it. And when they've gotten it, they've typically resolved it anyway. Speaking for myself, we had a punitive damage verdict in three cases. It went up on appeal. We

settled. You know, my clients were happier to have money than to sit around for five years waiting for a court of appeal. So I don't think it's a major factor. And in negotiation, by definition, there are things that everybody gives up to make a deal or a system work. I don't think that was a big issue for us to eliminate. I just don't think it was an important factor.

Q. Under the trilateral settlement, might not a very severely injured claimant, someone with mesothelioma, recover more money than under the global agreement.

A. Can I answer that from the perspective of my individual clients --

Q. Yes.

A -- in California? I suppose the first few who get to the courthouse before the mass consolidations that we talked about might, in theory, do better. I think Fibreboard will very vigorously defend any punitive damages claims, certainly. I don't want to speculate on the potential for actually recovering that, although I goes I'd like to think that if anybody is gonna get it, you know, I'll be one of them. But there is a potential in our area for verdicts against Fibreboard to be higher than $500,000 that's largely in the context of a couple of work sites that are largely World War II where Fibreboard was essentially all the insulation parts and labor, if you will. By definition those people are getting on in years and so they're not going to be $10 million cases. My experience under the assignment program and before that with Fibreboard is that we have had the occasional case that has settled in excess of $500,000. I was trying to figure out how many of the dozen that Mr. Snyder mentioned were mine. And my best estimate is probably somewhere between six and nine. But I just don't know offhand. I can probably think of at least five. When I look at those in terms of net to the client, virtually all of them would have done better with $500,000 under the trust than the six or six fifty or seven hundred that we got in settlement. Maybe by the time you get above 750,000, considering the fee differential and costs and so on, there might be, you know a few thousand dollars

swing. But I think that's a small thing to give up. And I'm confident that any client I have would make that same trade if they come in later on and they were presented with the alternatives. The decision would be: Better take the Ahearn deal at $500,000 than the -- everything that goes along with pursuing it in the hopes of getting a 700, 750, 800 thousand dollar settlement.

Q. You may have answered this question, but let me ask you this. As of August 27th, 1993, or today, granting the possibility that there might be some severely-injured victims who even after adjusting for the attorneys' fee differential, may net out more under the trilateral than under the global, why, in your view, is the global settlement fair, reasonable and adequate?

A. Well, as we did the global, looking at the interests of the future victims, basically -- and putting aside the case I might have filed August 30th as a member of the class who may have been diagnosed on August 1st, but looking long-term, the overwhelming majority of the class members have a history of exposure or they wouldn't get a disease that would later make them class members. They may or may not know about the exposure even, but they certainly don't know of any disease. And in effect, you know, all of them are saying, you know, "I'm willing to make this deal or these lawyers are telling me that it's a good idea to make this deal, and if I'm the one in a million who might have made $10,000 more or whatever more money later on, if the deal had been different, I might suffer from that. But on the other hand, the odds are much more likely that I'll be one of those who are going to net just as much, if not more, under this system, and the benefits and the protections that I get for all the reasons we've talked about, insurance risk and what Mr. Wachtell raised about the coverage issues and so on, you know, it's a rational -- indeed, the only rational decision. If you're asking me, you know, will you do better if you get to bet on horse races after they're over, the answer is sure. But nobody gets that choice.

Q. Are you saying then that as of August 27th and indeed as of today to a considerable extent the members of the class of fu-

ture claimants really don't know whether they'll be a severely-injured claimant or not, whether they'll be the one who if they were in the tort system might recover in excess of $500,000, and that therefore behind this veil of ignorance as of today the choice is better for the global settlement?

A. I think so. Well, you know, I'm sure that that's the case. And, you know, that's part of obviously what was on our minds as we did this. I mean, I personally took very seriously the obligation to act for clients, you know, who don't know that they're going to be somebody's clients later on. You know, I've had only 20 years of experience in asbestos of clients saying to me, when I explain all their options, invariably the response is: Mr. Kazan, you're the lawyer, you're the expert, I came to you because people say you know what you're doing. What should I do? And I tell them what I think, you know. So this is not like a new responsibility. It's something that we take very .....

Testimony of Steven Kazan, class counsel Tr. 1046-1047

And I think at some point they and CNA will likely agree that the smart thing to do, you know, is some kind of Chapter proceeding.

Q. Under the global settlement, pre-'59s and post-'59s are treated equally as far as availability of funds. In other words, there's no distinction anymore based on the insurance coverage situation?

A. That's correct.

Q. That might mean that post-'59 exposure will receive relatively more under the settlement agreement vis-a-vis pre-'59s than they did prior to the settlement agreement. Is that correct?

A. Well, under the assignment programs there was a disparity or discrepancy between how those two groups were treated. I think Mr. Snyder said that the April 9th agreement sort of removed that. And what we've done, essentially here, I think, is create a situation where each case gets resolved on its merits

without as you indicate, any artificial impact of the question of whether it would or would not have been covered under one of these policies, assuming these policies covered Fibreboard.

Q. What I want to ask you now, this is my final area, is there any unfairness, then, in the global settlement agreement due to the fact that you might be taking from Peter to pay Paul? In other words, taking from the pre-'59s in order to pay more to the post-'59s than before the settlement agreement?

A. Well, I don't think we do that. I think we take from CNA and Pacific Indemnity to pay Peter and Paul, and we've paid them both fairly and reasonably. And so if Peter is getting what he would have gotten in the tort system in a fair value for his case. I don't think he can or would or should object, you know, that Paul is also getting treated fairly.

PROFESSOR GREEN: No further questions.

THE COURT: Mr. Coleman.

MR. COLEMAN: Thank you, Your Honor.

Testimony of Joseph Cox, class counsel Tr. 1162-1165

those post-'59 cases satisfactorily even with the insurance coverage in place to cover pre-'59.

THE COURT: So then I gather you agree that there's a substantial risk of Fibreboard's bankruptcy even if they won the coverage litigation.

THE WITNESS: Your Honor, the uniqueness of this deal is that in my view the global is the only way that claimants can be paid -- all claimants can be paid a fair sum of money and Fibreboard can survive.

THE COURT: Okay. Now one last question. Do you agree from your legal analysis that there at least is a substantial risk that the mechanism used by way of the assignment procedure that was used places coverage for those cases at risk and at least that question would have to be litigated?

THE WITNESS: Are you saying because of the Andres opinion, would the assignment deals be at risk?

THE COURT: No.

THE WITNESS: I don't understand.

THE COURT: Would Continental have a legitimate legal basis to come in and say, "You have voided the potential coverage or violated the contract by entering into this assignment mechanism, and even though we lost the coverage case we don't owe insurance monies for those cases that participated in the assignment program"?

MR. RICE: Your Honor, excuse me if I may, but on behalf of our firm, we would object to that question and ask Mr. Cox not be required to give a legal opinion, because we may find ourselves in the position of litigating that issue and I would just as soon not be on record as to what our position would be.

THE WITNESS: I think I can answer that without giving a position.

[Laughter]

MR. WACHTELL: To be on record of what Continental's position would be, Your Honor's question was too mild. We would not only question the validity -- the obligation of insurance on the assignments, we would question any obligation of insurance.

THE WITNESS: Your Honor, I can answer the question.

THE COURT: All right. Go ahead.

THE WITNESS: I'm certainly not going to put us in a position, as Mr. Rice is concerned -- and he is well concerned -- Mr. Wachtell raised that issue yesterday in one of his questions. Certainly it is an issue. But let me say this about that, that issue. There's been a lot of discussion about whether or not Fibreboard has contributed anything to this settlement other than the $10 million. From the time in 1988 that they started this assignment -- the 40/60 program, and going through the assignment program to get CNA to the table, they put that company on the line. That company was on the line then, they ran up debts against their assets substantially higher than they were on that particular maneuver, it got CNA to the table.

On April 9, they had that leverage, they gave up all that leverage in exchange for a promise that CNA would try to negotiate a global, and again they put their company on the line.

And then when they entered into the global settlement agreement, and we insisted on a trilateral backup, there's no assurance that that global will go down, so that company is still on the line.

So if there's any question about whether Fibreboard put their company on the line or not, I don't think that that -- you know, the fact that their assets -- and one of the things that they did was pursue this assignment deal. And if Mr. Wachtell chooses to raise that issue, it's a situation that I suppose legally puts Fibreboard again in the position of putting their company on the line.

THE COURT: But that's really not my question. My question is: Is it a legitimate factor for this court to consider in

determining the fairness of the trust arrangement that a potential litigation exists over the validity of the assignment mechanism as it relates to whether it voided or affected coverage?

THE WITNESS: I think that is an issue the court has to consider, yes, sir.

THE COURT: Mr. Inselbuch, why do I need to hear anything else from Joe Cox?

MR. INSELBUCH: I just have one other very brief area, Your Honor, then I think we'll be done.

Q. You've heard a lot of testimony about an exhibit called Abbott 1, have you not?

A. I certainly have.

Q. Now, Mr. Roach, who is the president of Fibreboard, states in his financials that he files

Testimony of Joseph Cox, class counsel Tr. 1183-1184

certainly we made the determination and conveyed it very clearly that under no circumstances were we going to enter into a global settlement with a (b)(1)(B) with Continental and Pacific unless that backup trilateral was present. Because we wanted to make sure the money was there.

THE COURT: So at that point then we had two apparently inflexible positions. Your side said there was not going to be any global without a trilateral; Continental says there's not going to be a global unless it's a (b)(1)(B) so they can get out of the asbestos business. Right?

THE WITNESS: I think that's correct.

MR. WACHTELL:

Q. Continental was not saying that if there should be an agreement that it had -- it was adverse to the concept of a trilateral, though, was it?

A. [Pausing]

Q. Or bilateral, as it was then phrased.

A. I don't think -- my recollection is that there was some concern on Fibreboard's part about a trilateral or bilateral. I don't think CNA was particularly concerned. I guess as long as they could get themselves out of responsibility under the bilateral, they didn't care how it was done.

Q. You understood that Fibreboard had a real problem on it, because then they were coming up with a finite sum of money which would have to cover all claims, and if it didn't they would be in real trouble; is that right?

A. That's exactly right. And that's what I said a minute ago. By agreeing to do that, they once again put their company on the line.

Q. Going back to the state of play in July, where you have an understanding as to Ness Motley, and on August when it's signed, Ness Motley 2, as of those dates, did you understand that it was Continental's position that no matter what the negotiations were

on price or terms or the like that it was not prepared to enter into either the global or a backup bilateral without acceptable participation by Pacific?

A. Yes. In fact, that had been a sticking point at one time in Ness Motley agreement, which we got over; but, yes, it was true that acceptable participation by Pacific had to be done. And that was -- that was something that was not resolved until very late, because Pacific participation was not resolved until we went to Philadelphia on August 22-23 time period. And that participation was a sticking point for the negotiating counsel, because

Testimony of Joseph Cox, class counsel Tr. 1225

A. [Pausing]

Q. Right?

A. Well, it's -- I know that the Ness Motley agreement provided for the possibility for it rolling into the global. When we -- and that's consistent, because when we negotiated Ness Motley, Mr. Baron, and as I've said before, we had a lot of cases, and what we were doing in Ness Motley was going to have some implications, particularly as a price term, on any global discussions we had. And to the extent that we were negotiating Ness Motley and representing our present clients and exercising our fiduciary obligation to our future clients, we knew that was the case. And so we had an extra obligation to make sure that, knowing where CNA was coming from, that we reached a number in Ness Motley that would be fair to Ness Motley and that would -- when the global came down, would not adversely affect future clients as well.

Q. Mr. Cox, I think you've testified over and over and over in this court that there was a time, particularly in July, where you were still attempting to negotiate a presents and futures global deal. Right?

A. Correct.

Testimony of Joseph Cox, class counsel Tr. 1238

Q. All right.

A. The Ness Motley agreement.

Q. Whatever. In early August?

A. Right.

Q. I'd like to compare that in a sense with the global agreement that was reached in Ahearn. And what I would like to do first, I believe you testified on direct examination that under the Ness Motley agreement, the August 1993 Ness Motley agreement, a pre-1959 claimant could expect to receive on average $13,000?

A. Let us be careful when we go down this road.

Q. I'm going to get into how it's structured, but --

A. The average payment for all pre-59s under that deal was $13,000, 50 percent of which --

Q. Right.

A. -- was in cash and 50 percent subject to risk.

Q. Okay. We'll get into that in a minute.

Now, under the global agreement that was reached, Mr. Wartnick in his deposition and Mr. Snyder in his deposition opined that the average value of a case that would come to fruition under the Ahearn agreement would be somewhere between seven and eight thousand dollars.

Testimony of Joseph Cox, class counsel Tr. 1242-1256

MR. BARON: Thank you. Boy, it's tough.

Q. I want you to assume this average person. Am I correct in understanding from your prior testimony that this average person under the ness Motley agreement would receive, on average, about $13,000 as it becomes structured under the Ness Motley agreement?

MR. WACHTELL: The average person is presumably a blend of a pre- and post-'59. So I think the question is mistaken.

MR. INSELBUCH: Same objection.

THE COURT: I'll permit the witness --

MR. BARON:

Q. What does the average pre-'59 person receive under the Ness Motley agreement? What's the number?

MR. RICE: He has asked two questions that are entirely --

THE COURT: I understand. I understand. Answer what you can answer.

MR. BARON:

Q. What does an average pre-'59 claimant receive?

THE COURT: I thought we were through with the question.

MR. BARON: I want to be sure it was clear.

[Laughter]

MR. BARON: For the first time.

A. Mr. Baron, let me give you an explanation. And that might help you in framing your question.

MR. BARON: Thank you.

A. The Ness Motley agreement is initially negotiated was negotiated on an average of $13,000 per case for pre-'59 cases. That $13,000 contained an element of cash and an element of risk. The element of cash was 50 percent of that, or $6500.

Q. Correct.

A. If you -- that's for that example, for an average. However, the initial contemplation was that the numbers for that 13,000 average would be put on the point system and allocated across decade lines and across disease lines. So, therefore, each individual, depending upon the points, would get a different number.

At the end of the negotiations, CNA requested that instead of working off a $13,000 average that we work off a disease mix. And I think I testified to that yesterday. That disease mix represented the total money that those people would get if they had a $13,000 average.

Now, also in the deal there is a provision that on that disease mix there can be reallocation of those funds. So the same result that would have occurred under the point system, that is, the distribution of the 13,000, could occur under the terms of the agreement with respect to the mesothelioma cases, the asbestosis cases and so on with respect to pre-'59, but still they were subject to the risk, 50 percent of the money is subject to the risk.

Now, if that's all those people ever get, then that's all they ever get. And they would have gotten substantially less than the average settlement value historically of Fibreboard.

If they get all of it, having taken the risk, then they would have had the benefit of that risk.

Now, certainly if CNA had paid us a full cash value, there would have been another discount involved. In other words, if they had paid us full amount, I think Mr. Snyder estimated it at 15 to 20 to 25 percent, so that would lower your 13,000 number for full cash value. but the average for the Ahearn class that you talked about is a blended average, and the lowest blended average in Ahearn is $7500 under the Nicholson proviso.

If you take the Ness Motley blended average at 75/25, which is close to what it was, you get about 10,340 bucks or so. And if you reduce that for attorneys's fees and the costs, Mr. Baron, the net to client is still going to be about equal in Ahearn to what those Ness Motley people would get. So it's not as easy or as simple as you would try to make it out.

Q. All right.

A. The bottom line is that an Ahearn client is going to get just about the same thing net to client that a Ness Motley client under this Ness Motley deal for present will get.

MR. BARON: Your Honor, if I might, I'd like to test him on that, and I'd like to ask him specific questions on that particular issue.

Q. Listen carefully so that we can try to get through this quickly. Under the Ness Motley agreement, the pre-'59 average --

or the pre-'59 price average of 13,000 that you described is half in cash and half in a note of some sort. Right?

A. Well, half is subject to the contingencies that are described in the agreement, and that is a -- and you know what they are.

Q. I do.

A. It's the approval -- yeah.

Q. the contingencies are whether: 1, a global is done; 2, what was then called a bilateral, now called a trilateral agreement is done; 3, a win on the insurance case; and the fourth, which is the bad contingency, is a lose or a loss on the insurance case. Right?

A. That's correct.

Q. Okay. So the other half of the proverbial $13,000 gets paid only if there is a global, there is a trilateral or there is a win on the insurance, and it doesn't get paid only if there's a loss on the insurance. Correct?

A. Yeah, I think that's probably true.

Q. All right. And that half that doesn't get paid until something happens here draws interest, does it not?

MR. WACHTELL: I object to the form of the question. It doesn't get paid unless something happens.

MR. BARON:

Q. The contingent half, the 6500 that is the note, that note or whatever it is, whatever that instrument is that you agreed on, draws interest and will be paid interest if one of the -- if one of the four things that are the three good ones happens?

A. And there are provisions -- you're right. And there are provisions in the agreement for how that interest is going to be utilized.

Q. Okay. Now let's talk about the risk that was then extant with the Ness Motley claimants. First of all, you have a fiduciary obligation to those Ness Motley clients, and did on August the 5th, when you entered into this agreement, did you not?

A. Well, you have to break that down in two parts. With respect to the present claimants, we had a direct -- either a direct contractual attorney-client relationship with them or we had a relationship with our cocounsel who had a direct attorney-client relationship with the present cases. And we had a fiduciary relationship to future cases, future claimants.

Q. All right. Well, in terms of future cases that could come into the Ness Motley agreement that was entered into on August the 5th, that window ended on August the 17th, did it not, by agreement?

A. Run that by me again.

Q. Okay. In terms of the cases that could be presented for payment under the Ness Motley agreement that was entered into on August the 5th, there was a window that permitted any case to be presented to either Fibreboard or Continental, or whoever it was, up till August the 17th?

A. I don't recall exactly what the document says. I do recall an August 17 date for submitting claim forms, but I believe the language had something to do with subject 2 settlement. I just don't recall that specifically.

Q. Okay. But there was a cutoff date, was there not?

A. Yes.

Q. Where you couldn't submit any more claims?

MR. SNYDER: Objection. If he's referring to futures, there was no cutoff and that's misleading.

MR. BARON:

Q. No. Presents.

A. You are referring to presents? Yes, there's a date in there that deals with present cutoffs, yes.

Q. And after that date everything was to be considered a future as far as the handling under either Ness Motley or a global. Right?

A. Well, in the Ness Motley agreement everything after August 17 submission date would be considered a future under the Ness Motley futures agreement.

Q. Okay. now, on August the 18th, did you fell like you had a fiduciary obligation to those people who had participated in the Ness Motley agreement and whose $6500 on average was in a contingent state?

A. I had a fiduciary obligation to the futures that -- the future potential claimants of clients of Ness Motley who would claim under the Ness Motley agreement, yes, I did.

Q. And was it your obligation as a lawyer to do whatever you could to assure that that other 50 cents on the dollar was paid?

A. For those future claimants?

Q. For those people that were covered under the Ness Motley agreement.

A. Well, I had an existing obligation to the present claimants to try to obtain for them the risk portion of their payment, yes.

Q. Okay.

Now, as to the future claimants that you were representing, or a least had a fiduciary obligation to after you had been negotiating for them for a while, you had an obligation to them, did you not, to assure that the amount of money that they received was adequate?

A. I had an obligation as a fiduciary to the future claimants to obtain the best deal that I could and the fairest deal that I could for them, yes.

Q. And did you have an obligation to reject offers that you felt were inadequate?

A. Well, I think as the plaintiffs' attorney, we always object to offers that we consider inadequate; and we did so on a number of occasions in a number of settings. But what I's telling you here to what you're getting at is that a future claimant under the Ness Motley agreement and a future claimant under Ahearn will fare the same, Mr. Baron.

Q. What about a present claimant under Ness Motley as opposed to a future claimant under Ahearn That's the interest I'm concerned with.

A. I think I went through that structure for you just a second ago.

Q. You did. And on August the 18th, you had a fiduciary obligation to the presents under Ness Motley to see if you could get their other 50 cents on the dollar, yet you had a fiduciary obligation to the futures to assure that the number was an adequate number. Do you see any conflict between those two positions at all, Mr. Cox?

A. Mr. Baron, anytime you represent more than one claimant, such as you've described in my situation, there is a potential for conflict -- there was a potential conflict, I will guarantee with you that there was a potential for conflict in the negotiations that we were conducting, but there wasn't any conflict. And even if there had been one, it did not, as I have just described to you, affect the outcome. The people are going to be treated the same in terms of net to client. There may be a variation on a case-by-case basis, true, based upon evaluation of cases, but on average they're going to be treated the same. And I might add substantially better than they were treated under the historical settlement averages of Fibreboard.

Q. Now, under the Ness Motley agreement, again back to this average claimant who gets on average 6500 in cash and a 6500 note that draws interest, the only way that that claimant would not get the second 6500 is if there was a total loss on the insurance coverage. Right?

A. I don't know that I can answer that, because I don't know --

Q. Can you think of any other way that they wouldn't get their 6500 absent a total loss on the insurance?

A. Well, I mean what I'm saying -- what I'm having a problem is, I don't know what a partial loss on the insurance coverage would do. I really don't know the answer to that. I mean, if there was a complete loss -- if there was no global and if there was no trilateral and there was a complete loss of the insurance coverage, those people would not get any more than they've already gotten.

And that is the risk that they assumed in order to take the -- instead of getting an additional cash piece, they got a little more than an additional cash piece, but it wasn't real.

Q. Okay.

A. It's contingent.

Q. It's contingent. Now, if they didn't like their average settlement that was being offered to them under the Ness Motley deal and they weren't members of the class, they could just say no and go back into the tort system. Right?

A. The members of what, do you mean the Ahearn --

Q. No, your present clients.

A. You mean the futures piece? They could opt out of the futures piece?

Q. No.

A. They can opt out of the futures piece if that's in place.

Q. Mr. Cox, listen. If we're talking about a present client who had his claim liquidated under Ness Motley, if that present client, the average client, didn't like his $13,000 half cash, half the structure, that client had the absolute right to opt out of that deal and go back into the tort system?

A. That's right. There were individuals who had the right to opt out, and there comes in the -- the -- the interest piece. Because, as I said before, Mr. Baron, and I don't think there's disagreement anywhere, this was a good deal. And --

Q. Okay. It was a great deal. Because --

A. We haven't had anybody that's opted out of the tort system, let me put it that way.

Q. But they had the right to opt out and if they opted out they could seek punitive damages, they could go after joint and several liability, they could get prejudgment and postjudgment interest. Right?

A. [Pausing]

Q. Right?

MR. RICE: Your Honor, I object. It's an incomplete hypothetical.

MR. BARON: Assuming they won.

MR. RICE: Excuse me. Whether Fibreboard is in existence or not --

THE COURT: I understand.

MR. BARON: I understand. We can speed this up.

A. Well, taking the hypothetical in your best light, I suppose that a present Ness Motley claimant could opt out and go into the tort system and sue Fibreboard.

MR. BARON:

Q. Okay.

A. But they didn't.

Q. Okay. Now, if someone had come into your office 20 days later, August the 30th, and it was, the identical person, he just happened to miss his bus and he showed up at your office 20 days later, same fellow, and he now is claiming under the Ahearn agreement as of August 30th, first of all, he would expect that Mr. Average would be liquidated somewhere in the range seven, eight thousand dollars. Right? Same pre-'59, same individual?

A. Who are you talking about now? What are you -- I don't understand what you're --

MR. INSELBUCH: Objection, Your Honor. He's mixed up now the seven to eight thousand, made that pre-'59. And that's not the witness's testimony.

THE COURT: Do you want to run at it again, counsel?

MR. BARON:

Q. Same individual who was a present Ness Motley client, Mr. Average, pre-'59, and he shows up 20 days later, he could expect to receive somewhere around $7500 under Ahearn. Correct?

A. That's not -- that's not necessarily true, Mr. Baron. Under Ahearn, each individual is evaluated according to the historical averages, so on. You cannot compare what somebody is going to get in that process under Ahearn as an individual to what that

person would get under -- under the Ness Motley agreement. As I said before, the average person under Ahearn, all factors considered, the net to client is not going to fare any worse than the net to client Ness Motley deal.

Q. But they're certainly treated differently. Right?

A. They are certainly not. We treated everybody fairly, and there is nowhere in there that you can find a conflict or a differential.

Q. All right. Now, the person claiming under the global agreement will receive no cash at all until his claim is liquidated. And the guy that comes in on August 30th is going to have to wait until this deal is approved. Right?

Steve Snyder is shaking his head yes.

A. I think that's probably true because a claimant that gets paid today is going to get paid more than a claimant that comes in next year. But that's no different than normal in the tort system.

Q. All right. The same fellow who had come in on August 10th that could get cash under the Ness Motley deal is now going to have to wait until this deal is approved, assuming that it is approved. Correct?

A. I could say it would be approved a lot faster, but --

Q. Yeah, I understand that. But the bottom line is that they're going to have to wait till there's final approval?

A. Anyone in the Ahearn class is going to have to wait until final approval before they get paid, yes, that's true.

Q. They won't get 50 cents on the dollar while they wait. Right?

<u>Testimony of Joseph Cox, class counsel Tr. 1268-1270</u>:

proceeding.

Q. Well, the question was: Did you communicate with them or attempt to involve them in the process when you were negotiating this deal? That's the question.

A. I didn't personally ask Mr. Safchuck to come in and negotiate with us, no, sir.

Q. Okay. Did you ask for anyone's input from any of those groups while you were negotiating, to your knowledge?

A. Well, we've asked for input from a lot of different sources on this thing. I mean, I don't know that that was one of them. I -- you know, Mr. Kazan had contact with them. You might want to -- you might should have asked him about that.

[Laughter]

MR. BARON:

Q. Mr. Cox, I asked you in your deposition what would have happened if you had gone to Mr. Ahearn after August 27th and he would have said no, it's a lousy deal. Do you recall --

A. Yeah, I remember you saying that. Yeah, if once we had discussed and laid out all the stuff in front of him and he said, "I don't want to do this"?

Q. Year. What would you have done?

A. With respect to Mr. Ahearn, I would have wanted to know why and I would have asked him why. Because it would have given me some concern that he would have said that. And if he had said that, then I probably would have gone back to my people and told them why he said that, and we would have considered what he was saying.

Q. Well, do you remember--

A. But he didn't say that.

Q. Yeah.

A. And in addition, we would have probably, after considering what Mr. Ahearn said, tried to correct it or we would have gotten somebody else probably.

Q. That's what you told me when I asked you last time.

A. That's exactly right. We probably would have.

Q. Okay. So if he wouldn't have agreed to it, you probably would have gone and found somebody else?

A. Well, subject to his concerns. We have an obligation to Mr. Ahearn as our client. If ye had a concern, we would have

treated that concern seriously and we would have done something about it.

Q. Okay. By the way, Mr. Cox, have you ever filed a claim for an asbestos victims for medical monitoring?

A. Have I?

Q. Yes.

A. No.

Q. Do you know of anyone in your firm that has? Any of your partners, associates, anybody?

A. We have 53 lawyers. And I don't see half of them most of the time. So I don't really know -- unfortunately, I don't know what somebody does from one day to the next. But I can't answer that question. I don't know whether they have or not.

Q. Never come to your attention that anyone from Ness Motley has ever filed a claim for medical monitoring, is that right?

A. I -- I just can't recall.

Q. I see.

A. It's possible, but I don't recall.

Q. Mr. Cox, is it your practice generally to file claims for damage against asbestos companies for individuals who do not have an asbestos-related disease? Do you do that from time to time?

A. Do I do what?

Q. Knowingly?

A. Do I do what?

Q. Do you file claims for people who have no present disease, from time to time, knowingly?

Testimony of Joseph Cox, class counsel Tr. 1296-1298

stick with CNA.

Q. With regards to Mr. Jaques' cases, which you knew there was some number of them, whatever the number happened to be of them out there, did it ever occur to you or anyone else negotiating this deal that those people had retainer agreements, contracts with Mr. Jaques calling for representation in return for a one-third contingency fee?

A. I can probably tell you I knew nothing about Mr. Jaques' cases or what his relationships were with his clients. I had never had any meetings with Mr. Jaques, I never had any discussions with Mr Jaques or anyone in his firm about his cases, I knew nothing about his cases or the value of his cases or the lack of value. I knew absolutely zip.

Q. I understand that. But did it ever occur to you that there may be contingency-fee agreements out there that you were in effect impinging on by pursuing this class action settlement?

A. I -- I -- I don't believe that I impinged on anybody's contingency-fee agreements at all.

Q. Let's do it this way. What would Mr. Jaques get as far as a contingency fee if he ran his clients through the settlement, global settlement?

A. Through the Ahearn global settlement?

Q. Through the Ahearn global settlement, the 25 percent maximum, correct.

A. I think that the Ahearn global settlement provides that there is a 25 percent cap on attorneys' fees, in order to ensure that the client victim receives the maximum amount of money possible.

Q. I understand. Would you agree with me that generally speaking, not referring directly to Ahearn, but a future class typically would be all those people who had not manifested disease? That would be one possible definition for a futures. Correct?

A. I mean I -- you could decline the class any way you want to, if you want to. The class that's here is defined by all cases that haven't been filed as of a certain date.

Q. Here's my point. With regards to people who had not contracted disease and therefore had not retained counsel -- well, let's just -- let's break it down this way so we don't get bogged down.

With regards to those futures who had not retained counsel, there would be no fee issue, as I've just raised, with regards to those people. Correct? Because they hadn't retained counsel, therefore, there would be no contingency-fee contract?

THE COURT: Mr. Clark, I think it's fair to say that this proposed settlement may get disapproved for any number of reasons. That does not include the fact that claimants might save attorneys' fees.

MR. CLARK: Your Honor --

[Laughter]

MR. CLARK: Your Honor, I'll move to the next point. My point is really this --

THE COURT: I understand your point. You say Mr. Jaques had a contract with his clients, and to the extent of the difference between what they would get under Ahearn and what he would get in the event those cases got settled or tried to judgment, there's a differential there. And you're exactly right about that.

MR. CLARK: Right. And that there would be an interference with contract.

Q. Did anyone ever consider that issue, at any time, to your knowledge?

A. Interference with a contract?

Q. Interference with a contract.

A. You know, we considered a lot of things --

[Laughter]

A. I'm not sure that -- I'm not sure that that's

agreement.

Q. Those agreements were not principally negotiated by Continental, is that correct?

A. That's correct.

Q. Now, would you -- at the time when our firm was called in on this in February, when you started to become involved, just to -- we've heard Mr. Snyder's testimony as to what he was trying to do, and I'm going to essentially ask you whether the reciprocal was -- what the situation was facing Continental. Is it correct that you had had this massive assignment program where tens of thousands of cases had been reported to be settled by Fibreboard essentially using Continental's money and without Continental's consent?

A. Yes, there was such a massive assignment program.

Q. And is it correct that based on what we were advised by those who had been long involved in the situation that the values on these settlements had been very much escalating?

A. Yes, that's correct.

Q. And is it correct that it was Continental's belief that Fibreboard had no incentive to keep the values down and to the contrary had a considerable incentive to see them go up in order to pressure Continental?

A. That was also our belief.

Q. And was it also Continental's belief that Fibreboard was loading settlement values onto the pre-'59s and lightening up on the post-'59s?

A. I certainly believed that and believe it now.

Q. Is it correct that the judicial decisions which had been rendered were not going particularly well for Continental, that Continental had lost its punitive damage case in the Ninth Circuit, Continental had lost the Andres assignment case on the right to assign in the trial court in California?

A. That's also correct.

Q. Now, we did understand that that was not a res judicate procedure, is that correct, in the California procedure?

A. That's right.

Q. And was it also the case that Continental had attempted to take a writ of mandate and get an immediate review of that Andres decision from the California court of appeal and had failed in that attempt?

A. I believe that's what I was advised at the time.

Q. And as has been testified by all the witnesses, Continental was then faced with the lawsuit brought against it by Fibreboard in this court, by Fibreboard with the plaintiffs allied with Fibreboard who were representing to the court in substance that they had been successful in achieving a settlement of tens of thousands of asbestos cases and that all that was needed to finalize that settlement was for the court to agree with the Andres court that such assignments were indeed valid, that the amounts were reasonable and that it was appropriate to put -- to issue a bar order of contribution against Pacific? Is that correct?

A. I believe it to be correct. It was about 20,000 cases at the time.

Q. With the provision for more being added?

A. Well, more were added over time.

Q. And this, as you understood, was a court which had considerable familiarity with the asbestos cases and in Camino had seen values far higher than the values that were in the Ness Motley 1 agreement; is that correct?

A. That was my understanding.

Q. So would it be fair to say that one could not be wildly sanguine about the potential outcome of that litigation on behalf of Continental at least?

A. We were not specially optimistic.

Q. And in the coverage case as it then stood in California, is it correct Continental had pretty much struck out at the trial court level?

A. That would be a fair characterization.

Q. And we did understand that there were substantial arguments available on appeal, but there was certainly no assurance of obtaining a reversal; is that correct?

A. That's correct.

Q. And is it further the case that if there were a loss in the California court of appeal that under California procedure there was no right to review by the California Supreme Court, it was purely discretionary?

A. That's also correct.

Q. Now, the converse was true as well. If there was a win in the California court of appeal, that might well be the final decision in Continental's favor; is that correct?

A. That's correct.

Q. Now, did we then learn or did Continental then learn -- I'm not limiting my question to the law firm -- was Continental then apprised that Fibreboard was proposing to enter into a multi-billion-dollar global by way of assignment of all of its cases, class action, presents, futures with the plaintiffs?

A. Yes.

Q. And assuming that the assignments were valid, assuming there was a loss of the coverage case, then were that to happen Continental would have been forced to write checks for billions of dollars under an agreement as to which it had had no say on the terms and was facing the prospect of not being able to get even contribution from Pacific in that situation; is that correct?

A. That's true except that we had no way of knowing at the time what the ultimate cost of that agreement would be to Continental, because the settlement was not for an absolutely fixed amount with respect to the pre-'59 cases.

Q. Eventually we got a draft of the settlement. Continental was furnished a draft of what was purported to be the final or very close to the final form of a global settlement agreement; is that correct?

A. It is.

Q. And there was an original going-in amount for that settlement. Do you recall what it was?
A. I don't off the top of my head.
Q. It was in the billions.
A. It was -- for pre-'59 cases, it was somewhere around $2 billion.
Q. And then there were opt-out provisions which could cost more, is that correct?
A. That's correct. It was not a closed-end deal.
Q. And there were provisions for extra funds for third-party claims and the like and the like and the like; is that correct?
A. That's also correct.
Q. Now, did this situation indeed, to use Mr. Snyder's phrase, get the attention of Continental?
A. It had -- when -- when I first got involved, it clearly had the attention of Continental's senior management.
Q. And was a decision made by Continental at that time to see whether it was possible to achieve a global resolution of its entire-Fibreboard problem?
A. Yes, that is the decision that Continental made.
Q. And is that the decision that was then publicly announced along with an announcement of a decision to add $1.5 billion to Continental's reserves principally to recognize the seriousness of the situation that had developed with respect to its Fibreboard exposure?
A. Yes
MR. WACHTELL: And that, Your Honor, that announcement, is Fibreboard exhibit 552 in evidence.
Q. Did it prove easy to hand out this kind of money?
A. No.
Q. Was Continental in a position to negotiate with the class representatives who had previously been negotiating with Fibreboard?
A. No. Continental was not.
Q. And why was that?

A. Because Fibreboard had entered into an agreement with the plaintiffs that provided that the plaintiffs would not speak directly to us without Fibreboard's permission.
Q. That was actually a contractual term of the original Ness Motley agreement, is that correct?
A. Yes
MR. WACHTELL: And that, Your Honor is Fibreboard exhibit 917.

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1334-1337:

A. It was intended to be a comprehensive letter.
Q. And it set forth our view of the issues and the prospects in the coverage case; it set forth the problems with Pacific; it set forth the impediments to direct negotiation; it set forth why we believed that any deal had to be done on a non-opt.-out basis, given the unique circumstances that faced the parties as we saw it; it set forth the threat that we saw of Fibreboard and the plaintiffs essentially torpedoing negotiations by entering into a unilateral global. Is that essentially correct? Without necessarily meaning to be exhaustive?
A. I will accept your representation with respect to it. I don't have a recollection independently of each of those items.
Q. Now let me direct your attention specifically as to the position asserted by Continental right then that it was its belief that any deal had to be done, if there was going to be a global, that it had to be done on a non-opt-out basis. And can you describe why that was Continental's position?
A. Well, first of all, as has been described by -- by other witnesses before me, we were absolutely not prepared to have a circumstance in which Continental entered into a deal that was essentially a one-way option in favor of the plaintiffs; that is, if things went badly for Fibreboard and the plaintiffs in the coverage

case, then we would likely have virtually no opt-outs from the deal, but if Fibreboard were to be successful in the coverage case, we had no way of knowing how many opt-outs that situation might cause to occur, leaving Continental bound but plaintiffs free to choose depending on their assessment of how they would be better off at -- at that moment in time.

Second of all --

Q. Can I just stop you there for a moment? Is it correct that that analysis was predicated in large part upon a timing analysis of the likely time of decision in the California coverage case by at least the intermediate court of appeal as compared with any reasonable prospect of the date upon which a class could be given an opt-out or no-opt-out decision?

A. Yes.

Q. The California coverage decision --

THE COURT: Gentlemen, I feel compelled to mention one thing. I have for 15 years struggled with a regular court reported till this trial. Mr. Kelley -- I have been going through the transcripts, and they appear remarkably accurate. It has been transcribed at the rate of twice the average daily number of pages, for four straight days now. He has to be tired. And between the two of you --

[Laughter]

THE COURT: -- and the rate with which you speak, I'm afraid we may compromise the accuracy of this record. So I, No 1, express my appreciation to him; and, two, ask you to slow down just a little bit.

MR. WACHTELL: I think, Your Honor, my speed is probably a function of fear of wearing out Your Honor's patience, which has been remarkable, and finding myself cut off. I'll slow down.

Q I don't know if we had an answer. Was it the analysis that the likely time of decision in the California court of appeal would come first before any reasonable date where one could anticipate that a class would be given the decision whether or not to opt out?

A. Yes.

Q. And I interrupted your answer. Other than the one-way option, what other factor or factors led to our position on this having to be a mandatory class?

A. The -- the only way that it made sense for Continental to do any sort of deal, given the magnitude, the obvious magnitude of the number of dollars that would be involved, would be to do it in a context in which it had absolute certainty with respect to the settlement amount. In the analysis that -- that was performed, the conclusion was that -- that there was no reason to give up the opportunity to achieve no liability through continued litigation of the coverage case if we weren't going to have a -- an ultimate deal in which we knew for certain how many dollars would be paid out.

Q. Now, is it correct that our law firm had had very considerable experience with respect to class actions?

A. Yes.

Q. And had settled large numbers of class action cases?

A. That's true.

Q. Did we have any philosophical objection to opt-out classes?

A. No. We've done them numerous times.

Q. And is the situation the same, when you're dealing with a futures class of asbestos victims in affording a right of opt-out, as it is, say, if you're affording a right of opt-out to someone who

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1341-1349

accomplished.

Q. Now, did we give consideration to the potentiality that we were being bluffed by the proposed unilateral global assignment?

A. Yes.

Q. And what did we conclude?

A. Our conclusion was that they indeed were prepared to go ahead and execute a global assignment.

Q. They had entered into the Ness Motley for tens of thousands of cases, is that correct?

A. Yes.

Q. And they were not shying away from a court in seeking to have the assignment concept approved, is that correct?

A. That's also correct.

Q. Now, you then had, as the testimony has indicated, the assignment program going forward in the threat of this global assignment. What did we understand was going on in terms of the Ness Motley action in this court and any proposed trial date or what was likely to be happening in that action.

A. We understood that the Eastern District of Texas essentially was a jurisdiction which one could expect a speedy trial. The issues were not to be so complicated before the court that -- that this would take a period of years. We understood that the pretrial discovery procedures were likely to be relatively abbreviated and that we could expect to see the matter go to trial within 1993.

Q. Do you recall it was reported to us that the court had indicated a trial date of I think July?

A. I don't recall that.

Q. Now, the trial would also include, if we were to lose it, the prospect of a contribution cutoff against Pacific; is that correct?

A. Yes. That was actually the more serious problem of having that -- that matter go forward to a litigated conclusion; that is, the risk of finding ourselves standing alone without our partners at Pacific.

Q. And just to be clear, the contribution cutoff that was being sought as in that action as a condition to approving the Ness Motley settlement was not limited to the Ness Motley numbers; is that correct?

A. That's correct.

Q. This was going to be an across-the-board cutoff as to any liability that Fibreboard might have?

A. It was global cutoff.

Q. And even after the first meeting with Judge Parker, did we understand that we were in a position to engage in direct negotiations with the plaintiffs' representatives?

A. Not at -- not at that time. We weren't in a position to have a discussion with the plaintiffs until after the April 9th agreement had been executed.

Q. Indeed, is it correct that the plaintiffs were taking the position that the sole function of Judge Higginbotham was to attempt to mediate the Ness Motley assignment litigation, and that they were not prepared to talk to us?

A. That's what the prior testimony here has been, and that's my recollection as well.

Q. And indeed the Ness Motley firm, as you've indicated, was under a contractual bar prohibiting them from talking to us; is that correct?

A. That's correct.

Q. And were those then the factors which led Continental to the negotiations resulting in the April 9th agreement?

A. Yes.

Q. Now, Continental obtained very significant benefits from that agreement, is that correct.

A. We believe that we did, yes.

Q. And let me tick off at least certain of them, then you can either agree with me, disagree, add, subtract.

The agreement agreed to bar any further assignments by Fibreboard or any settlements without Continental's consent; is that correct?

A. That's right.

Q. And it basically obtained for Continental direct access to the plaintiffs with Fibreboard acting jointly together with Continental to attempt to achieve a global; is that correct?

A. Yes.

Q. There were also releases in the agreement -- by the way, Your Honor, the agreement is Fibreboard exhibit 908.

The agreement also obtained for Continental certain releases from Fibreboard claims that Fibreboard was either asserting or threatening?

A. That's also correct.

Q. And it contained a release of any property damage asbestos victim claimed against Fibreboard, is that correct?

A. I believe that's correct, too.

Q. In return, Continental had to give things up; is that correct?

A. Yes.

Q. One of the things it had to give up was that it had to formally contractually agree to fund Fibreboard's current defense of cases, is that correct?

A. That's right.

Q. Now, there's been testimony that Fibreboard had -- excuse me -- that Continental had written a letter the previous July offering to do that, is that correct?

A. Yes.

Q. But this was now a contractual commitment that Continental was undertaking, is that right?

A. That's right. But that was not the -- that was not the principal thing that Continental gave up in the agreement.

Q. Okay. What was the principal thing that Continental gave up in the agreement?

A. Continental agreed that it wouldn't seek to do a global without Fibreboard, and that any global that it would do with Fibreboard would be funded entirely within Fibreboard's available insurance resources.

Q. Let me just focus on that. There was no requirement in that agreement that Continental in fact do a global, is that correct?

A. Well, there was an obligation that Continental would exert its best effort to do a global. There was no obligation for Continental to agree to pay any particular amount of money in order to get that done.

Q. And that was expressly provided -- and I'm looking at the exhibit, Your Honor, it says, "Fibreboard and Continental shall use their best efforts to jointly negotiate and finalize a global class action settlement with asbestos-related bodily injury death claimants as described in section 2 hereof" -- and I'll come back to that section 2 hereof -- "provided, however, that nothing in the foregoing shall obligate Continental to pay or obligate itself with respect to any particular amount or amounts of money or to agree to any particular term or terms in order to achieve such global settlement." And that's the proviso you were talking about, is that correct?

A. Yes.

Q. So that Continental was saying, "We're gonna try in good faith, we're gonna go out and try to do a global, but we're not committing ourselves," is that correct?

A. Well, we're not committing ourselves to pay any particular price that Continental may well have concluded was just too much.

Q. Now, at the time that this agreement of April 9 was entered into, was it -- what was Continental's and its counsel's perception of the likelihood of achieving a global settlement?

A. I think that we thought it was going to be difficult to accomplish.

Q. It was not a slam-dunk, is that correct?
A. Oh, no.
Q. Was there any assurance that any global agreement would ever be reached?
A. No.
Q. And referring now to the section 2 of the agreement, "Any global settlement Continental negotiates with claimants shall include all present and future asbestos-related bodily injury and death claims against Fibreboard." There's a provision for presently-settled claims which I'm going to skip over. "For the resolution of which Fibreboard shall not be obligated to pay more than amounts then or thereafter available to Fibreboard from Fibreboard's asbestos-related bodily injury and death insurance and its asbestos-related bodily injury and death-related insurance settlements," and there's a parenthetical. And that is the clause you're referring to, is that correct?
A. Yes, that's the other clause I was referring to.
Q. So that by this agreement, Continental was saying if there is a global, it will cover all Fibreboard liability, pre-, post-, present, future; is that correct?
A. That's correct.
Q. And Continental and maybe Pacific, if Pacific could be dragged in, would bear the entire tariff? That was the contractual obligation that Continental was undertaking by this April 9th agreement, is that correct?
A. That was the obligation.
Q. And that was the obligation that Continental undertook in terms -- in return for the concessions that it got from Fibreboard at that time. Continental agreed that Fibreboard would not have to contribute noninsurance assets, and Continental, rather, would pay the entire tariff that it would take; is that correct?
A. Well, the insurers would pay the entire tariff.
Q. Well, and if Pacific didn't pay it and if there was going to be a global, then Continental would have to pay it; is that correct?

A. That's correct. That's not the only thing that Continental gave up, but that was the largest.
Q. And was this an arm's length bargaining? Or would you term this some sort of exclusive deal to create a limited fund?
A. It was a horribly difficult negotiation.
Q. And each of the parties gave up quid pro quos, and this was a quid pro quo that Continental was forced to give up and to agree to; is that correct?
A. Fibreboard simply wouldn't do the deal any other way.
Q. And Continental thought, acting at arm's length from Fibreboard, that it was in Continental's best corporate interest to make that concession in return for what it was getting from Fibreboard; is that correct?
A. That's correct.
Q. Where was Pacific while all this was going on?
A. Well, Pacific had -- Pacific had made a separate deal with Fibreboard, first in 1991, and then again in 1992, as Mr. Snyder previously testified to, And I think it's fair to characterize

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1352-1356:

indefinitely.
Q. Okay. We've now had -- we've also heard testimony then that there had -- that there was the first meeting face-to-face, other than in Judge Higginbotham's chambers, first negotiating session between Continental, plaintiffs' representatives and Fibreboard, took place in Washington, and I think that's been fixed as April 29 and 30; is that correct?
A. That's correct.
Q. And is it correct you've heard the testimony of the various witnesses that that meeting was not particularly successful?
A. I've heard the testimony and it's accurate.

Q. There was a discussion set forth on mandatory class, and there was a debate on the practical issues and the like; is that correct?

A. Well, my recollection of the meeting is that, speaking for Continental, you, Mr. Wachtell, went through all our positions, of which there were a number, and that the plaintiffs repeatedly asked during the course of the day for us to put a number on the table, which is what they were most interested in, while indicating disagreement with virtually everything that you said. And we worked after the session concluded on the 20th to put together some numbers to hand to the plaintiffs the following morning. The numbers were -- were written out in your hand on a piece of paper that was distributed to the plaintiffs at 8:00 in the morning, at Mr. Inselbuch's office, where we -- where we reconvened.

Q. And that piece of paper actually is exhibit A to --

A. The May 12th letter, I believe, to Judge Higginbotham.

MR. WACHTELL: Which is Fibreboard 686.

Q. We set that forth to Judge Higginbotham to show what we had proposed to the plaintiffs, is that correct?

A. That's correct.

Q. Going back to the meeting, you heard Mr. Cox's testimony in which he indicated -- I don't want to characterize it -- that their attitude was, "Here's this new law firm here, what do they know about asbestos?" Did you hear that testimony, or essentially?

A. Yes, uh-huh.

Q. Was that a fair characterization of how we experienced the reaction of -- plaintiffs' reactions?

A. They -- they were not particularly tolerant of our -- of our coming into the case as we did, when we did.

THE COURT: Counsel, let me interrupt you a moment.

Mr. Welch, did you notice whether Jim Coleman is still on the floor? I'm not talking about in the courtroom. Is he outside?

THE MARSHAL: He is, Your Honor.

THE COURT: Would you please tell him I have no need of him right now, but I will at 3:00? Ask him to step in at 3:00.

Go ahead, counsel.

MR. WACHTELL:

Q. By the way, was it the case that our firm was novices about asbestos?

A. Well, we had not been active in the personal injury litigation in asbestos; but no, we were not -- we were not total novices.

Q. What had we been involved in?

A. We had been involved in aspects of Manville, and we had also been involved in -- in some representation of OCF.

Q. Now, was there also a discussion at the meeting about Continental's position with respect to Pacific and how that related to any proposal that Continental might put on the table?

A. Well, as the testimony has been up until now, it was Continental's position from day one, and it remained its position, and that never changed up until August 20th, that Continental was -- was prepared to do a deal only if it was an acceptable level of contribution to the price from Pacific Indemnity.

Q. And what did the plaintiffs say with respect to that?

A. "Nuts."

[Laughter]

Q. Now, on the morning --

THE COURT: They approached the battle of the bulge by then?

MR. WACHTELL: It's the 50th anniversary, Your Honor. Then it was like the 48-and-a-half, I guess.

Q. And you indicated that on the morning of the 30th then a dollar proposal was indeed put on the table and in fact was written on a piece of paper. And what was the reaction to that?

A. The plaintiffs took the copies of the paper and they -- they asked for an opportunity to caucus by themselves in a conference room across the corridor. They were gone somewhere between 80

and 90 seconds and they returned to the room and Mr. Inselbuch said words to the effect that they had been presented with a take-it-or-leave-it offer and they chose to leave it. And then they chose, themselves, to leave.

Q. And Mr. Bschorr arrived on the scene very shortly thereafter, is that correct?

[Laughter]

A. Mr. Bschorr managed to keep Pacific from being a part of the negotiations.

[Laughter]

Q. Okay. Now, to try to move quickly through the period of time after that walkout, is it correct that for a period of time thereafter the position of plaintiffs was, particularly in the meeting before Judge Higginbotham, that the global negotiations were over, that the only things to be discussed was resolution of the Ness Motley litigation, and that Judge Higginbotham's role was limited to assisting that negotiation?

A. That's correct.

Q. And is it correct that Continental's position was that the parties were essentially engaged in a

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MR. CLARK: Your Honor, if I may answer that question at a later date, as you might suspect, I'm not in a position to give you a definitive answer to that.

THE COURT: Very well.

MR. CLARK: So perhaps when we resume I'll have an answer for you at that time.

THE COURT: Thank you, counsel.

Was there a question on the table? Or were we getting to start a new question?

THE WITNESS: I think we had a --

MR. WACHTELL.: I withdraw.

MR. INSELBUCH: If I might, while Mr. Wachtell is attending the lectern, one of our exhibits was never filed with the court and was actually never completed and never distributed. And just for correctness, we would move to withdraw it at this time. It's Class Plaintiffs Exhibit 1012. And I thank the clerk for bringing that to our attention.

THE COURT: Granted.

MR. WACHTELL:

Q. I think I was asking and perhaps you answered the question as to what plaintiffs' reaction was at the May 5 meeting with Judge Higginbotham with respect to CNA's position that any global settlement would require adequate participation by Pacific. And I so ask --

A. I think I answered that question. And the answer was that we set forth the position that we consistently set forth both prior to and after that May 5 session with Judge Higginbotham.

Q. I'm asking you what the plaintiffs' reaction was to our position.

A. The plaintiffs' reaction was that this was an impediment, they weren't particularly interested in negotiating a deal that was then going to depend on whether or not a contribution was obtained from Pacific Indemnity, especially under circumstances where it was being set up as having to be at a level acceptable to Continental.

Q. Okay. Now, you, I think, had indicated the best way you thought to proceed was kind of to recount what happened next. By all means, go ahead.

A. Well, moving on from the May 17 letter -- well, moving on from May 5, my recollection is that there was a -- a meeting to discuss, among other things, the Ness Motley agreement that took place in Baltimore on May 13th. And essentially the meeting was largely restricted to Ness Motley, but Mr. Rice

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Ness Motley price. And at that session you indicated a willingness to recommend to Continental a price for global that was higher than the one that was offered to the plaintiffs on April 30.

Q. Now, I think you then referred to a meeting in Baltimore on May 25. And who were the participants in that meeting?

A. I was there, Steve Snyder was there, Joe Cox was there. We were supposed to have been joined for some period of time by Joe Rice, but my recollection is that Mr. Rice spent no meaningful amount of time at that meeting.

Q. And what is your recollection of what the -- what, if anything, transpired relevant to this proceeding?

A. Well, what transpired was that actually before I got there, Mr. Snyder had handed out a document to Mr. Cox, which was also given to me, that reflected far higher numbers of cases and values divided into cells which Mr. Snyder was throwing out as a concept on which a global might be based. I was surprised at it, because, as I said, both the number of cases that were being handled in the cells and the possible pre-'59 value was considerably higher than anything that we had discussed or had contemplated. But there was some discussion that day of using the cell concept.

The -- meeting continued until mid-afternoon and I had had an opportunity during the course of the meeting to be educated by both Joe Cox and Steve Snyder about historical levels of settlements at Fibreboard, and I heard at length from Joe Cox as to why he thought $13,000 a case was a reasonable value for pre-'59 cases.

Q. And was there then an arrangement to meet again?

A. Mr. Rice -- my recollection is that that was a Tuesday. Mr. Rice was going to be in Philadelphia on Thursday for -- for a Georgienne -- I think then it was Carlough hearing that was going to be going on. And since we had barely seen any of him in Baltimore, the suggestion was made that if Mr. Snyder and I came to

Philadelphia that we would be able to get some time with Mr. Rice to discuss global.

Q. And did that then happen?

A. Well, Steve Snyder and I went to Philadelphia. We did not see a lot of Mr. Rice. What we did see of Mr. Rice was extremely discouraging in terms of making progress on -- on a global.

And during the course of one of the long interludes in which we were waiting for Mr. Rice, I asked Mr. Snyder why it wasn't possible for Fibreboard and CNA merely to conclude their own arrangement without -- without the plaintiffs.

Q. And what was his reaction?

A. He said that this was something that Fibreboard had been interested in doing in the past, that it was Continental that had already indicated that this wasn't possible, and I heard from him about some of the history from Fibreboard's perspective on this. And I left that meeting, called you to let you know what the substance of the discussion had been, and we several days thereafter started discussing among ourselves the possibility of doing a bilateral deal, both because we were very discouraged, given the absolute no-talks attitude by Messrs. Kazan and Wartnick, and the difficulty that we perceived we would have in dealing with Messrs. Rice and Cox, and because we thought that quite possibly if the plaintiffs thought that we were going to do a separate deal with Fibreboard, it might increase their interest in coming to the table to talk about a global.

Q. And was there then exploration and discussion between Continental and Fibreboard as to the possible negotiation of a bilateral agreement?

A. Yes, there was.

Q. Would you recount it?

A. We held several meetings with the Fibreboard representatives during the month of June 1993 that were for the purpose of seeing whether we could reach a bilateral agreement that did not include the plaintiffs. There were meetings in New York, there

were some limited discussions in Washington, and you may recall that on June 30th, you and I attended a meeting at the Brobeck offices in San Francisco with a number of members of the Brobeck firm and with Michael Douglas, the general counsel of Fibreboard, in an effort to see whether we could reach agreement on a bilateral.

Q. What were the outcome of those discussions?

A. If I might, I'd like to -- I'd just like to interject something to pick up a thread that was left hanging from something I said earlier.

Q. Sure.

A. Part of the -- part of the thought in starting to discuss a bilateral was the hope that we could get the plaintiffs interested in something back to the table on a global. When that was reported to the plaintiffs, their attitude was basically, "That's fine with us; go ahead and reach a deal with Fibreboard. That would be perfectly okay."

We had a very difficult meeting on June 30th. There had been a lot of difficult meetings in this matter, but this one would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. It became very clear to us during the course of that meeting that it was going to be nigh onto impossible to reach a bilateral deal with Fibreboard. We had the Pacific Indemnity problem; that is, that we weren't prepared to lay out billions of dollars without an acceptable level of contribution from Pacific. The Fibreboard appreciation of a bilateral was that if they could not turn around and use the money to achieve a' -- a settlement, a global settlement with the plaintiffs, they would be left with the obligation of providing their own defense from -- from these funds, and they told us that that was going to be a very significant cost. And I got the very definite impression that the Fibreboard side was not in agreement as among themselves as to whether or not a bilateral agreement was something that was in the best interests of Fibreboard, and came away with the conclusion not only

that it would be a long time before we could put some of the people who had been in the room back in a room together again given -- given what had taken place that day, but also that there were people on the Fibreboard side who simply would -- would never agree to -- to the kinds of numbers that Continental might consider paying on a bilateral.

Q. You heard Mr. Snyder testify that the only reason that he was ultimately willing, on August 27, to accept the concept of a trilateral agreement was because I think he perhaps called it the carrot of the global, that it was the condition -- that his agreement to a backup trilateral was a condition precedent to getting the plaintiffs to go along on the concept of a Global. Do you have a view as to whether there was ever a prospect of successfully negotiating an independent bilateral or trilateral agreement with Fibreboard at a price -- well, at the price which is in the trilateral agreement?

A. I don't believe that we could have -- that we could have achieved that. We had extraordinary difficulty getting to a trilateral agreement, first in concept after the price parameters we thought had already been set, and then we had tremendous difficulty in getting from an agreement that had been achieved in principle in New Orleans on September 9th to a documented agreement which didn't get completed until more than a month after that. So it -- my own personal view is that but for the plaintiffs having imposed this condition upon us as something that we would be required to achieve before they would ever agree to document a global and work out the rest of the terms and conditions beyond the price term that would be necessary, was that there was no chance of achieving a separate bilateral or trilateral agreement with -- with Fibreboard.

Q. Let's go back in time now to whatever was happening with negotiations --

A. May I just add something to that answer?

Q. Surely.

A. I want to put a time frame on that. I don't think I ever thought about what might be achievable at some point after a coverage case decision, but certainly within the kind of time period that we were talking about in 1993.

Q. Let's go back to May 28th, where you're out cooling your heels in the corridors outside the Georgienne hearing. What happens after that in terms of any discussions with Ness Motley or any of the other plaintiff representatives?

A. Well, just so that we have the details straight, it wasn't a corridor. We had a small room across the corridor that was available to us, and that's what we used.

Q. With that emendation, would you continue?

A. The next thing that I can recall happening is that there was a discussion of -- a further discussion of numbers on a global with -- with Joe Cox. And I'm having a little bit of difficulty recalling whether it occurred just prior to a meeting that was held on June 15th with all of the plaintiffs' counsel or whether it occurred just after that meeting. But I think it occurred before that and it occurred in New York.

Q. And what was the nature of that meeting?

A. There was a -- what I'll call a further education discussion with respect to numbers. And the numbers that Joe Cox was talking about gave us some encouragement if we were talking about nominal amounts but were simply unacceptable if we were talking about present values.

Q. Now, you referred to a meeting of June 15th. Where was that meeting and who attended?

A. There was a meeting in Washington at the offices of Caplin & Drysdale. We met in the conference room across the corridor from the conference room which had produced such a successful result on April 30th. And the participants at that meeting were -- were, as I recall them today, Mr. Rosen and myself, there was nobody present from -- from Brobeck or Fibreboard, and Messrs. Kazan and Wartnick, Mr. Rice was there, I

believe, but I'm a little bit less certain that Mr. Cox was there, and Mr. Lockwood and Mr. Inselbuch.

Q. And what happened?

A. We had a -- a discussion of a number of issues. We discussed Continental's position with respect to a mandatory non-opt-out deal. And Mr. Rosen and I tried to explain, in as nonconfrontational a way as we could, that it was going to be impossible for Continental to do a global deal here that wasn't done on a mandatory non-opt-out basis absent some other device that for certain would have completely nailed down the -- the total price to the insurers up front. We didn't see any other way to do it. Despite Mr. Snyder's great creativity, he hadn't been able to set forth anything that we felt comfortable with. And none of the explanations of what the plaintiffs thought they could do fit the bill. And so we were left with mandatory non-opt-out.

The plaintiffs were most interested in getting a price or an indication from Continental that it would be willing to pay a certain price for what was referred to as a first tranche or first cell of claims, somewhat following up on Mr. Snyder's cell theory or proposal that -- that was used as -- was rolled out as a concept in Baltimore May 25. And we indicated that there was some flexibility from Continental on price, that we would go back and determine what Continental's willingness was with respect to an amount of money that might be paid on a global over the first five years of the global, and we were dismissed from the room for the plaintiffs to have a discussion about their position on 23(b)(1)(B) mandatory non-opt-out. Voices could be heard from the corridor, although it was difficult to make out what people were saying.

Q. This is not the California jailhouse, I take it.

A. No. This was the Caplin & Drysdale office. And Leonard Rosen and I were reluctant to appear at the conference room across the way. Sort of had a bad karma. And so we were outside in the corridor. And after some time, we were asked back into the room, and Mr. Rice proceeded to speak for the group. He indicated that the plaintiffs would be willing to consider a 23(b)(1)(B)

if we could articulate the legal theories on which it would be based, and assuming that we understood that it was going to cost a -- a good deal more ultimately for -- for us to do a closed-end (23)(b)(B) deal if we could satisfy them on a legal theory. Then the price might be -- if Continental -- and we always read that to be the insurers -- were prepared to deal with the cost at their own expense of the cases that opted out if we did an opt-out deal.

There was a list of questions that the plaintiffs left us with that they wanted answers to before there would be further negotiation or at any further negotiation. And I remember flying back to New York with Leonard Rosen and both of us were -- were encouraged that for the first time we were making some progress towards reaching our global.

Q. Now, you've indicated previously that Continental's going-in preference in these negotiations were to go directly to a global, bypass any separate Ness Motley agreement and have Ness Motley fold into the global, is that correct?

A. That's correct.

Q. And did a time come when Continental determined that that was not a feasible course of procedure?

A. Yes.

Q. Well, let me first, if I might, place it in time. The global that we were talking about certainly through the meeting on June 15th and beyond was a global that would include all cases, all presents, all futures. Continental's goal here was to get out of the asbestos business with Fibreboard. We wanted to do it in one package arrangement and we wanted that to be it. And, of course, in that sort of regime Ness Motley was -- the Ness Motley cases were a group of cases that would fold into any global.

As -- as June moved into July, it became less and less likely to us that we were going to be able to just hold the Ness Motley matter off and relegate it to a global. And that was for several reasons:

1. It has been some time that Judge Parker had let this matter sit with no real progress to show for it. We were extremely concerned that the matter was going to go forward to trial sometime in -- in the late summer.

We had finally understood that the California court of appeal would be through hearing argument on the coverage case sometime in the period likely before Labor Day. They were sending out notices of argument on the various phases of the coverage case on a fairly regular basis, about once a month. And unless there were some unnatural sort of hiatus, one could calculate that sometime between late August and the middle of September the coverage case was going to be submitted for decision. The procedure in California was we were advised that the court of appeal would have had its decision largely written by the time it heard the last argument on the coverage case and a decision could come at any time thereafter. But the global negotiations were -- protracted is the wrong word. Until June 15 there was no reason for us to believe there was any real prospect of negotiating the global. But given all the issues involved, it was going to be very difficult to do this before Labor Day, get it completed before Labor Day. And while the plaintiffs had indicated some movement on the 23 (b)(1)(B) mandatory non-opt-out issue, at least in terms of a willingness to consider it, the reaction of the plaintiffs to our position that we couldn't do a deal without an acceptable level of contribution from Pacific Indemnity was still, "Nuts." That's nuts in quotes. And the circumstance that we found ourselves in was that Pacific Indemnity, although regularly invited to the table, decided that this was a table that it did not wish to -- to visit, let alone participate at in a meaningful way, and that the position we found ourselves in was that there was leverage on us because of the 5.2 order issue being tee'd up in the context of the Ness Motley litigation here in the Eastern District of Texas and we had no leverage on Pacific, and that the only way that we could turn the table, so to speak, with respect to that was to get rid of the Ness Motley litigation, and the only way to do that was to settle the Ness Motley case. And so we concluded, as June turned into July and as it became apparent at the end of the month that no bilateral

agreement was going to be reachable, or at least so we thought, between Continental and Fibreboard acting without the plaintiffs, it became important to us to settle the Ness Motley cases.

Q. Now, there's been reference to a meeting in Washington which was then followed by a dinner of yourself, myself, Mr. Rice and Mr. Cox. Do you have

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throughout this period of time there were not only attempts by Judge Higginbotham to get a discussion going between Continental and Pacific, but there were, as I recall, some phone calls that went back and forth between senior management of Continental and Pacific, because it was a major objective of ours, indeed a necessity, to try to get them to the table, since the plaintiffs did not appear to be willing to deal on any -- on any basis that left a deal contingent on being able to get them in later.

We -- we were not eager to get back to the plaintiffs with answers to all the questions on the list, which I believe are set forth in the letter that I saw for the first time yesterday that went from Messrs. Rice and Cox to -- to Judge Higginbotham.

Q. Does that letter substantially accurately set forth where matters stood, to your best recollection?

A. From the Ness Motley perspective, I think, yes.

Q. We were getting close to an agreement on Ness Motley?

A. We were getting close to an agreement on Ness Motley. There had been numerous price negotiations. We were beginning to conclude that Joe Rice was just not going to budge off of $13,000 a claim for pre-'59 claims, which still struck us as a horribly inflated price given -- given the overall settlement history. We were not in agreement, although we had gotten close, with respect to the cash component.

And perhaps this would be a good moment to digress just for a moment. The Ness Motley settlement was not one that was happening in a vacuum. After the April 9 agreement was -- was signed, Continental and Fibreboard had a series of meetings, some in New York and I believe some in San Francisco, with a view towards developing a strategy for a national campaign to turn assignment agreements into three-party agreements. That was because we had assignment litigation that was coming up in other venues besides the Eastern District of Texas. The 5.2 order was at issue in other litigation. We knew we were going to have to deal with these matters. We were anxious not to be facing them in a courtroom context given the fact that we were now working or trying to work with Fibreboard to achieve a global. All of these arrangements where we were on opposite sides of the table with Fibreboard on litigated assignments just added to the complications of the difficult working relationship that we had to begin with. And so working very closely with Steve Snyder and Bill Levin and Helen Merrick from CNA and Larry Terry and Sarah Shields and Rod Eshelman from the Carroll Burdick firm, we had worked hard to put together a national settlement program in which we went to numerous law firms and offered to turn the assignments into three-party settlements with a discount for a cash component, with the balance contingent on what we've described as a triple trigger; that is, a resolution of -- in those days, it was a double trigger, but a resolution of the coverage case or ultimately a loss for Continental on the coverage case. And the Ness Motley negotiations were actually occurring in the context of our trying to reach agreements with -- with numerous plaintiffs' law firms that had these assignment deals. And one of the things that we discovered in those negotiations, and I should have mentioned this in connection with our decision to settle Ness Motley, is that no one was particularly eager to cut a deal with us only to find out that later on a more advantageous deal or more attractive deal had been cut with somebody else. And given the fact that the world knew there was this huge aggregation of Ness Motley claims that

was pending trial in the Eastern District of Texas, it became very apparent that it was going to be virtually impossible to settle anything other than a handful of other firms' claims without setting a pattern someplace. And the only logical place to set a pattern was with Ness Motley. Because we were confident that once we had achieved an agreement with the Ness Motley firm that there were so many cases involved that numerous other law firms would -- would be likelier to agree to a Ness Motley type settlement and we would be able to eliminate some of the assignment problems that we had around the country.

Q. Mr. Koplow, let me ask you on that question, during this time frame, June, July, going into that period, did Judge Higginbotham express any view as to with respect to whether we should back off of our position of going directly to a global as opposed to trying to get Ness Motley out of the way?

A. Yes, he did.

Q. What was that?

A. But again, if I can take things -- I know I went out of order by digressing back, but that comes a little bit later in July and I think I'd like to cover the first week-and-a-half or so in July.

Q. Go ahead.

A. What was going on in the first 10 days of July was, as I mentioned, we had gotten close on Ness Motley, close on the price, close on the cash component, and although there were still other terms of the agreement to be worked out, those were the places we had to start. Judge Higginbotham was putting pressure on to try to get to some agreement between Continental and Pacific. And as I said, we had -- we had had a horrible meeting on June 30th about a bilateral. We were due to meet with Judge Higginbotham and the Fibreboard folks and Ness Motley I believe around July 13th. And Just before that meeting, we received a letter from Fibreboard that appeared to us to be setting Continental up for a bad-faith claim in the event that global negotiations were unsuccessful.

Q. This is the July 9, 1993 letter?

A. That's the July 9, 1993 letter.

MR. WACHTELL: For the record, Your Honor, Fibreboard exhibit 583.

Q. Continue.

A. And I would say that it was -- it certainly is fair to characterize that letter as having to some degree substantially worsened an already bad relationship between Fibreboard and Continental. It did, however, provide some additional -- as impetus to get the Ness Motley cases settled and out of the way. With that letter as background, we met with Judge Higginbotham sometime around July 13th.

Q. When you say "we," who is that?

A. Leonard Rosen was there, I was there, Rod Eshelman was there and Larry Terry from Continental; Steve Snyder and Bill Levin were there, I believe, from -- from Fibreboard; and Joe Rice and Joe Cox were there. The meeting was at the federal courthouse in -- in Dallas. And Judge Higginbotham pretty much started the meeting out by expressing a view as to how we should proceed. And that view was that -- was that we should limit global discussions to future cases, that we shouldn't try to tackle the global until we had resolved Ness Motley, that we ought to open Ness Motley up. At that point one of the negotiating issues was whether -- what cap would exist on claims that could come in through the Ness Motley agreement, because as the weeks wore on, more and more cases were -- were reported to us as being in the inventory of Ness Motley law firms. And Judge Higginbotham expressed the view that rather than do a presents and futures global. We ought to use the Ness Motley vehicle as the mode for settling the bulk of the presently-pending Fibreboard cases. The view that Judge Higginbotham expressed, and I have a fairly clear recollection on this, was that he prefaced his remarks by making the comment that he had been having discussions with other judges and after doing so he had reached the conclusions that he then proceeded to articulate, namely what I just testified to.

Q. And did Continental take Judge Higginbotham's views to heart in how it proceeded thereafter?

A. Yes. Although I must -- I must say that we were not particularly happy about proceeding that way.

Q. And why not?

A. Because it was -- it was our view that splitting the presents off from the futures like that would almost certainly result in an overall increased cost to Continental. And I might add that it is my view that that is precisely what the effect was of severing the presents and futures.

Q. Now, you talked about people being able to prognosticate the likely scheduling of arguments in the California court of appeal. Toward the end of July, was the final argument in fact scheduled?

A. Yes, it was. I don't remember whether the final argument -- whether we learned of the final argument in late July or early August. I think it may have been early August. But it was certainly in that time period. And it was very -- it was very clear, again because the postcard notifications from the court of appeal kept coming on regular four-week intervals, that we were -- we were headed for a late summer submission of the coverage case to the court of appeal.

Q. An then it was scheduled for August 27, is that correct?

A. Yes, ultimately the last phase was scheduled for argument on August 27.

Q. So now we're I guess in the late July/early August time frame. What's happening? Focus at this point is on Ness Motley, is that correct?

A. The focus was -- was -- was on Ness Motley, and then our continued efforts -- that is, Continental's continued efforts -- to get Pacific to the table, because we were still quite concerned that without getting Pacific to the table we just weren't going to be able to get a global -- a global done, because of our position and the plaintiffs's -- and not only the plaintiffs', but Fibreboard's reaction to it as well.

Q. Okay. August 5 the evidence indicates that the agreement -- written agreement was reached on Ness Motley putting all of the issues to bed. And let me ask this: Is it correct to summarize that agreement -- and I know there are a lot of provisions to it -- that Continental succeeded in reducing the price in Ness Motley 1 in return for giving up its challenge to the assignment issue and giving up, I guess 50 percent of the amount -- giving up its challenge to the coverage issue as the 50 percent of the payments that it would make under the revised agreement?

A. Yes. Effectively what -- what happened was we got an agreement that was fairly close to -- to Continental's national program of trying to reduce these assignment settlements by 20 percent for a cash payment, and that cash payment in the Ness Motley case and then in the agreements we did with every -- virtually everybody else, we were able to reach agreement with was a 50 percent cash payment.

Q. Now, do you have the view as to what the numbers would have been or whether the numbers in the Ness -- revised Ness Motley settlement would have been any different if the negotiation were being conducted on a clean slate rather than under the gun of the first Ness Motley agreement and the imminence of litigation and the threat of the 5.2 order?

A. There's no question in my mind that the Ness Motley agreement would not have been settled at figures as high as -- as Ness Motley had used.

Q. What happened on August 5?

A. I don't want to lightly skip over the late July period

Q. Go ahead.

A. There were very difficult negotiations on the balance of the Ness Motley agreement, in particular relating to the futures provisions in the Ness Motley agreement, and with close to marathon sessions being put in to -- to get those -- those other provisions finally -- finally resolved. And we came to -- to Dallas on August 5th with agreement having been reached on -- on everything but with some cleanup left to do on the agreement.

Q. And was there a conference with the court on August 5th in Dallas?

A. There was a conference with the court that included Judge Higginbotham as well.

Q. And what happened?

A. Using one of the courtrooms in the federal courthouse in Dallas, Judge Higginbotham made an

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THE COURT: Be seated.

Mr. Koplow.

[Mr. Koplow resumed the witness stand.]

THE COURT: I understand one group of attorneys got displaced with carpet. Did you make alternate arrangements?

MR. INSELBUCH: We have, Your Honor.

THE COURT: Are you ready, counsel?

MR. WACHTELL: Good morning, Your Honor. Happy New Year.

Q. Mr. Koplow, where we left off, you were discussing a meeting that took place starting in Philadelphia on a Sunday night, and you were describing the fact that the plaintiffs indicated that they were no longer prepared to do a combined present and futures global settlement. Now, can you tell us what the problem was?

A. Yes. Just to -- to make sure that the chronology of things is -- is as I remember them, the events or the discussion in which the plaintiffs indicated they were no longer ready to do a presents and futures global took place the following Monday morning; but what we were told by the plaintiffs was that they simply didn't have a sufficient level of confidence in the information available on the unsettled presents to allow them to take on the risk, including the unsettled presents, within a global.

Q. And the risk being what, as you understood it?

A. The risk being that there would turn out to be more unsettled present cases than they were being advised of and that those cases would -- and the cases that were then listed as unsettled presents would turn out to be more valuable cases than any estimate being put on them by either Fibreboard or Continental. And in truth, there really was not a great deal of information on some of the unsettled presents; and because of the systems in our various states that permitted people to file cases without serving them on the defendant right away, in fact, there was a substantial lag time between any date and the date on which you could have a high level of confidence that you knew of all the cases that existed on that earlier date.

Q. Am I correct that the risk was if it turned out that there were more unsettled presents than were anticipated, that that would divert monies from the future class?

A. Yes.

Q. What happened after the plaintiffs said that that was their position?

A. Well, it was -- it was then clear that the only global we were going to be able to do with the plaintiffs was a futures only global. And we set to the task that day of once again reviewing all of the unsettled claims, first with Fibreboard, and then internally with the CNA people working on this, and ultimately, in the early days, with senior management of CNA to try to determine what CNA's exposure might be with respect to the unsettled presents. I know I'm digressing here for a moment. Under the agreement that had been reached with Pacific just the day before Continental was receiving a flat contribution from Pacific toward the presents. So to the degree there were significantly more unsettled presents or they were more expensive than anticipated, all of the cost was coming from Continental's pocket, none of it was being shared with Pacific.

And after trying to get a handle on the amount of unsettled presents, we were -- we were given authority at the end of the

day to increase the offer to be made to the plaintiffs to an amount of money that I strongly believed would be sufficient to get a deal done.

Q. Was there an offer on the table at that point from Continental and Pacific?

A. I think when we started that process the offer on the table was a billion three.

Q. And what happened then?

A. We had arranged that we would reconvene the meeting of all of the negotiators at 10:00 that Monday night; and after making a few remarks to the effect that this was it, that we were increasing our offer by a substantial amount, an amount that we thought would also reflect the plaintiffs continuing insistence that -- that we put a larger amount of money on the table to make up for the fact that Fibreboard wasn't there and available to the fund, I put the number of $1,500,000,000 out as the insurer's last offer.

Q. Now, you say to make up for the fact that Fibreboard was not available for the fund. Can you tell us what discussions there had been on that subject prior to your making this $200 million raise?

A. One of the -- one of the constant refrains of the plaintiffs from the point in time earlier in the summer when there seemed to be a recognition that we wouldn't do a global that wasn't a 23(b)(1)(B) was that not only was this going to cost Continental more, but it was going to cost Continental to put up an amount of money over and above what we may have thought was reasonable to cover the futures to provide call it a quotient, as it were, to allow for the fact that under what we were proposing, and given the April 9th agreement, Fibreboard -- Fibreboard's net worth was not going to be available to any future claimants.

Q. And what were the reasons which led to that offer to raise the amount being proposed for a futures only class settlement from 1.3 to 1.5 billion?

A. We were treating it more or less as a preempted bid. We did not want to get engaged in a negotiation given the fact that it

was now late Monday, August 23, and the coverage case was going to be submitted for decision on Friday, August 27th in a series of small moves. We wanted to put a number on the table that we thought was going to be and would in fact prove to be sufficient to get the deal done.

I had formed a belief that the lowest number we were likely to get the plaintiffs to take was a billion five hundred million dollars; and in terms of negotiating with these plaintiffs, I had formed the view that they had had and would have a difficult time determining when that's all there was and there was no more to be had.

And then raising one's bid progressively by steps, to my experience, tends to feed that feeling on the part of the other side, and therefore we did this all in -- we did this all in one fell swoop.

Q. And I think you indicated in a prior round, sir, that it was your actual belief that the $1.5 billion number would do it and would be a number that would be acceptable.

A. Uh-huh. That's correct.

Q. Going back to the question of the plaintiffs insistence that if Fibreboard was not going to be making a contribution and if the entire settlement was going to come from the insurers, the insurers would have to make up the amount, so to speak, was there a discussion as to what kind of amount the plaintiffs had in mind represented Fibreboard's equity or worth?

A. There were several occasions in which the number $200 million had -- had been bantered about, give or take 10 or $20 million. And there had also been at an earlier stage in discussions, and one that got carried through, the idea of setting up a separate tranche that would cover outer years, so to speak, that would be sized in approximately the same amount as Fibreboard's perceived net worth back in the summer of '93.

Q. And was the $200 million raise designated to meet that tranche?

A. We had already indicated that the offer was being structured in tranches before August 22nd, so that the $200 million that

was in tranche 2 was our first attempt to meet the plaintiffs concerns in this regard. That simply -- that simply proved not to be sufficient to get them to agree. And so this additional $200 million was yet another way to meet it, which means that at least in our view we had already put $400 million on the table to meet the -- to meet the concern over and above, frankly, what some of us would have viewed as an appropriate level to get a futures deal done.

Q. Did the plaintiffs indicate where their $200 million, give or take, number for the net worth of Fibreboard came from?

A. I was aware because the plaintiffs had informed us of the work that had been done by -- that they had commissioned to have done by Mr. Sinclair back at the time that negotiations got underway.

Q. And that was a number he had come up with for them?

A. I believe it was a number that was a little bit above $200 million.

Q. And that was, of course, a number that was higher than the reported book net worth of Fibreboard, is that correct?

A. I believe that it was higher than the reported book net worth, it was higher than the market capitalization of Fibreboard, it was a higher number than anything that you would get to using thumbnail valuation techniques, by a very considerable margin.

Q. So it actually represented work done by their banker and the advice given to them by their banker, is that correct?

A. That's what I understood.

Q. Now, at any time during this process did Continental attempt to persuade Fibreboard that it should kick in funds toward the settlement?

A. I can't recall ever directly asking Fibreboard to kick in funds. We had a contract with Fibreboard and we honored that contract with Fibreboard. On the other hand, we never threw ourselves bodily between the plaintiffs and Fibreboard on those occasions when -- or other than bodily on those occasions when the

plaintiffs would turn their fire on Fibreboard to see what could be extracted from -- from the Fibreboard representative at the table.

Q. And when you say that we had a contract with Fibreboard, you're referring to the April 9th agreement whereby Continental had agreed that if there were to be a global it would pay -- or it along with whatever other insurance assets were available to Fibreboard would have to bear the entire freight, is that correct?

A. That's the contract I was referring to.

Q. What happened was that Mr. Rice and Mr. Inselbuch walked out of the room. This had been after some joking when Mr. Inselbuch walked into the room, because he chose the seat closest to the door, which was an event that I remarked upon. And the two of them walked -- walked out of the room, leaving the other plaintiffs representatives, Mr. Wartnick, Mr. Kazan and Mr. Cox, and I believe Mr. Lockwood was there as well --

Q. Mr. Sweeney?

A. And Mr. Sweeney continuing to set at the table.

Q. Did anything else happen that evening?

A. There was a -- there was a significant amount of unhappiness on our side of the table. There had -- it was not a polite walkout. And there was a discussion that ensued about making one last effort to see if we could get all the parties on the same page by reconvening in Tyler and requesting the assistance of the court in the process at the end of the week. And due to people's schedules Thursday, August 26 was chosen.

Q. Prior to Thursday, August 26, had Judge Parker had any involvement in the global settlement negotiations?

A. Other than making the decision to appoint negotiating counsel and charging people to negotiate, no, he did not. Not -- certainly not that I'm aware of. And I would have been aware, I believe, if he had been involved.

Q. You previously referred -- I'm going to go back for a moment -- to the negotiations that commenced in Dallas immediately upon the appointment of negotiating counsel by Judge Parker back on I think it was August 9, is that correct?

A. Yes.
Q. And was Judge Higginbotham involved in those

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April 9th. In our trying to understand why discussions were proceeding with these particular counsel, having not been a part of those negotiations, we were -- we were anxious to satisfy ourselves that the three law firms involved and Caplin & Drysdale were the right people to be negotiating a deal with.

When -- I note that was one discussion and it, I'm certain, took place in the period April 9th, after April 9th, and before our first meeting was convened in Washington on April 29th.

After the April --

Q. Stay there for a moment. And what was discussed and what conclusions were reached?

A. What was discussed was that Fibreboard did describe to us what the history had been with respect to negotiating with these counsel. Told that Mr. Kazan and Wartnick were Fibreboard's chief adversaries on the West Coast, that counsel basically looked to them with respect to Fibreboard, that they were the most knowledgeable counsel and viewed as such by their colleagues on the West Coast with respect to Fibreboard, and that for those reasons they were the appropriate people to be negotiating with from that part of the country. We were told that the Ness Motley law firm was involved in somewhere around 50 percent of the asbestos claims in the United States and that they were generally regarded by the asbestos bar as being the leading law firm in this area, that they were folks that you simply could not ignore. And they had the ability, if they reached a conclusion that something was in the best interest of asbestos claimants generally, to persuade many of their colleagues that their judgment was indeed correct. And so that while they weren't the easiest folks to -- to

deal with, any of them, not just Ness Motley, the fact of the matter is that if we wanted to reach a deal that would indeed be perceived by the plaintiffs' bar generally as a fair and reasonable deal, these are the folks who would have to negotiate.

Q. It's fair to say that it was Continental's understanding that Fibreboard was negotiating with its principal adversaries, is that correct?

A. That's certainly what I understood from those conversations.

Q. Okay. Now, I interrupted you. Was there further consideration at any later date as to whether it was feasible or desirable to attempt to negotiate a global settlement with some different counsel?

A. As I believe I testified last time, there came a point in late May/early June where we had been pretty unsuccessful in moving global negotiations forward. Mr. Kazan and Mr. Wartnick were taking the position that there were no global negotiations and that all there was for us to negotiate were the Ness Motley agreement or for that matter the individual claims that -- that other counsel had against Fibreboard. And we had been unable to get any significant amount of attention from Mr. Rice except to the degree that Messrs. Rice and Cox did things at the direction of Judge Higginbotham. And so at the same time that we began to look at negotiating a bilateral agreement with Fibreboard because it looked like a global was going to be nigh unto impossible to reach, we also once again questioned Fibreboard with respect to whether or not, given what we viewed as the intransigence of plaintiffs counsel here, there might be other appropriately situated law firms with -- with whom we could carry on global settlement discussions.

Q. And what conclusion was reached?

A. The conclusion that was reached was the one that naturally followed from the information that we had been given in April; that is, that these were the appropriate people to be negotiating with, that were there to be other counsel with whom we

could negotiate, even hypothetically, that it would be viewed by members of the plaintiffs' bar as -- as an attempt to run around the people who were most aggressively, and in the toughest fashion possible, representing plaintiffs' interests. And we had engaged other people to, for want of a better term, reach some sort of a sweetheart deal when we couldn't get -- when we couldn't get these counsel to do a deal that they didn't believe was appropriate. That given the degree of respect that Mr. Kazan and Mr. Wartnick had on the West Coast, that it would be quite counterproductive to try to run around them and do something else, and that given the degree of participation in asbestos claims nationally and the amount of respect for the Ness Motley firm, that any deal that we struck with someone else would likely be stillborn because of the ability of the plaintiffs' bar to rally around any opposition that might be brought to such a deal by -- by Ness Motley. And so we concluded that -- that we would simply be wasting our time if we attempted to go around these plaintiffs' counsel.

Q. Let me now direct your attention to August 26, Thursday, 1993, where you say that this was the first time that Judge Parker had any direct involvement in the negotiations. Will you tell us what transpired?

A. All of the various constituencies arrived in Tyler midday on Thursday, the 25th, and we had, given the fact that discussions were either going to bear fruit or likely fall apart over the next 24 hours, I think virtually anybody who had participated in any phase of the discussions came to Tyler. So there were a very large number of people who were here and assembled in the courtroom and the lobbies and the various rooms off the lobbies and courtroom.

The judge got a smaller group of people to convene in the conference room that is directly outside his office and basically asked the parties to explain to the court where we were in the negotiations, how far apart we were, what the differences were, and the like. And over the course of the afternoon, both in what I'll call a committee of the whole and then in individual groups, the

parties met with the judge with no one's position budging in any degree that I can recall.

Q. You say that the general understanding was that either it was going to be -- my words, not yours, I guess -- make-or-break within the 24-hour period. Why was that?

A. The coverage case was being submitted for decision on Friday, August 27th. And there was great concern expressed by the Fibreboard people repeatedly, I might add, that there not only could be California court of appeal decision issued in the coverage case very soon after August 27th, but that they seemed to have information that the California court of appeal indeed would, and repeated suggestions by our side over the course of the summer that surely we had a little bit of time beyond August 27th, to Labor Day or perhaps a week or two beyond, given the number of issues involved in the -- in the coverage case, and our hope that the California court of appeal would -- would pay attention and modify any draft decision that had been -- been written based on oral arguments before the court. Fibreboard was really quite insistent that all we could really count on was August 27th, and the sword was likely to fall very, very soon thereafter. And everyone realized that no matter -- no matter how we perceived -- that is, the negotiators perceived the positions to be after such a decision was issued, because we all knew of the possibility that the California Supreme Court would -- would grant review, the fact is that were the court of appeal to decide in favor of Fibreboard, it would certainly make it more difficult with the broader plaintiffs' constituency to each a deal, and that no one could really predict how it would upset the applecart. And while we didn't have all the apples yet arranged on the cart, the fact of the matter is that no one was eager or optimistic about how easy a job it would be to reset the entire cart once the court of appeals decision came down.

Q. How about the converse? What if the court of appeals had ruled for Continental and Pacific?

A. Well, that likewise would have caused a serious problem. There's no question that the insurers would have, in my mind,

walked away from the offer that was on the table, and that while that would not have -- would by no means have ended matters, the fact of the matter is that that's also the upset applecart scenario. It would have taken a great deal of time to replace apples in the cart such that you could get a deal done.

Q. Do you believe that it would have been possible to get a deal done at the price that was then on the table if the court of appeals had ruled in favor of the insurers?

A. Oh, no. There's no way that the insurers would have -- would have agreed to pay not only the amount of money that was involved with respect to the futures class, but it would have had -- it would have had an effect on all of the present claims as well.

Q. In other words, the insurers would not have been prepared to enter into a deal that would have triggered the back end of the present claims for full value?

A. I think that we would have seen much renegotiation of settlements if indeed there was going to be anything that would have triggered a backout.

Q. Now, you have stated, in the various conferences that took place on the afternoon of August 26th with Judge Parker, that the parties essentially reaffirmed their position of Continental and Pacific at that time?

Q. Our position was that we had put a fully-priced offer on the table for a futures deal, that it was an enormous amount of money, more that we were aware at the time had ever been offered in any similar settlement, that we meant it when we said that that was it, and we were not going to increase that offer by any.

Q. With respect to Continental, was this a mere negotiating position? What was the actual authority and what were the actual instructions of the representatives of Continental at that time?

A. The actual instructions were not even to think about raising it by a cent, and not to come back and to ask for any more.

Q. And what about Pacific, as you understood it?

A. Pacific had made it -- had made it very clear. And here, too, I should backtrack. In the discussions that we had with Pacific over the weekend that led to the Continental-Pacific agreement of August 22nd, I personally had represented to the Pacific -- to the Pacific representatives, both principals from the company and their attorneys at White & Case, that I believed that a billion-and-a-half dollars in fact would obtain a futures global for the insurers. And Pacific had made it very clear that they were simply not prepared to go any higher than that amount of money and that basically we weren't even to think about it.

Q. Now, you have told us about meetings of the committee of the whole, as you phrased it, meetings of the separate parties before Judge parker that afternoon. Were there extensive discussions of the various issues that would go into the fairness of a settlement or the legal problems or any of the other issues that have been discussed in this courtroom now for over a week?

A. Oh, no. That's not -- that's not what went on at all. The exchanges were really on a -- I'll call it very superficial level. The plaintiffs were demanding, as I recall, still a billion nine hundred million dollars, and we said a billion-and-a-half and not -- and not a penny more. And while general arguments in support of our position were made to the effect of the ones I already alluded to -- that is, this was a huge amount of money, it was more money than anybody could ever reasonably expect to be paid for these claims, et cetera, et cetera, et cetera, there was -- there was nothing that you would term detailed analysis or even any analysis of all of the components or any of the components that one might examine on a fairness hearing.

Q. Did Continental and Pacific view the plaintiffs' ongoing demand for something like a billion nine to be a serious number?

A. No.

Q. And can you tell us from Continental's perspective or, if you know, Continental and Pacific's perspective, what the insurance company deemed was happening in the negotiation and why plaintiffs were out?

A. I don't know what -- I don't know what Pacific was thinking. I know that what we were thinking at the time was that

plaintiffs were making one last effort to see if we could be turned upside down to determine whether there was any change remaining in our pockets. And frankly, I think it's fair to characterize many of the plaintiffs' lawyers that we negotiated with, but certainly these four, as people who have never been aware of a penny in a defendant's pocket that they weren't going to fight and scheme to get for themselves, and do so endlessly.

One of the frustrations of the negotiations generally with respect to present claims as well had been the amount of time that one can spend on seemingly small items, because the negotiations tend to turn into a sporting contest on the part of a plaintiffs' lawyer to see what and how much can be gotten, as even small amounts of money seem to take on great amounts of significance. I can recall spending a fair amount of Judge Higginbotham's time, I thought, in not an appropriate fashion while we fought about 50 or a hundred dollars per claim on the Ness Motley deal. So what we perceived was going on was one final effort by the plaintiffs to see if by bringing us to Tyler and taking us all the way to the deadline date of August 27th they could manage to extract yet additional dollars from the insurers.

Q. Now, did Judge Parker at any time act in a manner other than you would deem to be a normal manner for a settlement judge trying to get the parties to reach their differences?

A. No. It's what -- what one would normally expect. Not even so much from a settlement judge as from -- as from a judge who had parties before him in a matter, knew that the parties were in settlement negotiations and basically used the best offices of the court to try to persuade the parties that having come as far as they had, that they ought to find a way to bridge the gap.

Q. What happened then?

A. The judge had somehow determined during the course of the day which folks from the negotiating group he would separate out to try to continue negotiations during the evening. And without being told where we were going, we were asked to get into

several vehicles that were parked in back of the courthouse, and it turned out that we were all being driven to the judge's home.

Q. And what happened when this core -- was this a core group of counsel, essentially?

A. He managed to select out the people who had done most of the negotiating.

Q. Maybe you better tell us who it was, or to your best recollection.

A. It was all of the negotiating counsel; that is, Messrs. Rice, Cox, Kazan, Wartick, Sweeney, Mr. Inselbuch from Caplin & Drysdale --

Q. For Fibreboard?

A. For Fibreboard, Mr. Snyder was there, Mr. Douglas, who was the general counsel, I believe, was there, Mr. Levin was also there, I think Mr. Erwin may have been there --

Q. From Pacific?

A. For Pacific. Paul Bschorr was there.

Q. For Continental?

A. You were there, Mr. Rosen was there, I was there.

Q. Is that your best recollection of the people who attended? I'm not trying to suggest to you that your recollection is wrong. I'm just asking a question.

A. No, I think -- I think that was it.

Q. Okay. And did Judge Parker indicate why he had brought this group out to his home?

A. Well, when -- when we were all assembled there, the judge indicated that he thought that -- that perhaps a more informal atmosphere would be conducive to getting everyone on the same page.

Q. What happened then?

A. Well, for a short while after we arrived, people -- people were eating hors d'oeuvres and enjoying the judge's refreshments. The judge then asked us all to sit down at a large dining-room table that I -- I believe the judge crafted himself. And the judge

patiently began to take the ball through what the differences were. And as I can recall them, there were essentially two:

1. The plaintiffs wanted more money from the insurers.

2. They wanted money from Fibreboard.

And there weren't, as I recall, any -- any more sophisticated issues than that. The insurers kept insisting that there was no more money to be had from the insurers and Fibreboard for a while continued to insist that there was nothing from Fibreboard and at some point during the course of the evening agreed that it would contribute some $10 million essentially consisting of another insurance policy that it still had, if that would get a deal done.

Q. Now, in the course of your deposition, and I don't have the page in front of me, but you made reference to an example that the insurers were trying to stay out on the lawn so they could avoid the judge pressuring them or something to that effect. Can you explain what you were talking about? In the first place, were you serious?

A. Well, the fact of the matter is that while -- while it was a 90-degree evening in Tyler outside, we were in the position of having been told by our client that there was no more money to be had from the insurers. The plaintiffs were continuing to demand some large amount of money above where we were. And the judge was -- was constantly focusing people on August 27th and how far we had come, and that we ought to be redoubling our efforts to get to the end.

Under those circumstances, staying inside was -- was likely -- was indeed a good deal hotter than being outside on the lawn. And given the fact that -- given the fact that we now had a partner, namely Mr. Bschorr, who was representing Pacific, who made it absolutely clear that he wasn't even going to talk to anybody except to repeatedly utter the word "no," it seemed to us as though it was a good deal less pressured outside than inside the house, which indeed it was.

Q. Did you deem that Judge Parker was acting in a way that was inappropriate in any respect?

A. Oh, no. This is -- as a veteran of -- of many years of judges in the district courts and bankruptcy courts getting parties to focus on -- on settling a matter, this was nothing other than what I was accustomed to. On the other hand, I would say that most smart advocates attempt to accommodate the views of district court judges and bankruptcy judges when they're in a position to do so. And we were desirous of -- of looking reasonable in front of Judge Parker and we were desirable of getting to a deal, if there was any way to get to a deal.

Q. But we were desirous of looking reasonable and getting to a deal, but we didn't have any authority to raise the offer whatsoever; is that correct?

A. That was the comfortable position that we were in.

Q. Did a point in the evening come when it was indicated to Continental and Pacific that Mr. Rice had indicated that he actually would take only a billion six?

A. Yes. Mr. Rice did -- did indicate that he would come three-quarters of the way if we would -- if we would come up a quarter of the way.

Q. Did you view this as a very munificent gesture on Mr. Rice's part?

A. No. Because I didn't think it was ever reasonable for him to be at a billion nine, a billion eight, a billion seven, or a billion six.

Q. What was the response of the insurers to this suggestion?

A. Well, the response to the suggestion was that we simply could not and would not do it, that a billion five was the most that we were going to be able to do.

Q. What happened next?

A. Well, it seems that the plaintiffs had also decided to go for a walk outside the judge's house. And at some point, Mr. Cox approached me on the lawn to indicate that there was going to

have to be -- there was going to have to be some additional movement by the insurers if we were going to be able

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Q. Chubb being the parent company of Pacific?
A. Of Pacific. And around 6:30 or 7:00 that morning, I was advised that the insurers would reluctantly go along with this, provided that that got a deal done.
Q. What happened then?
A. We were all due to reconvene at the courthouse that morning. And the parties reconvened. I remember thinking that this was it, we would get done. This had been a very long, grueling stretch, and I know people were anxious to get back home and see their families. And I labored under the mistaken view that having gotten this accomplished, we would be able to make an announcement in the courtroom that morning and I would -- I would get home for -- for the weekend.
Q. Did that occur?
A. No.
Q. What happened?
A. There were a myriad of things that people wanted to nail down. For one thing, the plaintiffs wanted to know what security was going to be put up by the insurers to absolutely guarantee that this enormous amount of money, which had now grown to over a billion-and-a-half dollars, would be there when the time came; they wanted to negotiate a rate of interest that they were going to be paid on this money from August 27th until such time as it would be paid over; the plaintiffs had all along insisted that just as Continental was unwilling to put itself and ultimately Pacific in a position where there would be a one-way option with respect to getting a deal done, the plaintiffs were no more keen on leaving -- no pun intended -- of leaving themselves in a position where the

insurers could get a free look at the coverage case; that is, that if the global for whatever reason failed to get approved and the coverage case went badly for Fibreboard, that at the end of the day they would have secured, in effect, nothing for -- for the class they were representing, and they therefore insisted that while they would agree in principle to a deal and agree on a price, they would do nothing else towards documenting and finalizing such a deal unless and until Fibreboard and the insurers had a deal in place settling the insurance coverage case as between them. That discussion then raised many of the most difficult problems that we had had getting to a bilateral agreement with Fibreboard earlier in the summer, which largely was a function of the fact that a billion-and-a-half dollars paid in a global is not, in Fibreboard's view, and I think they're right, the equivalent of paying a billion-and-a-half to Fibreboard outside of global because of considerable defense costs that Fibreboard would -- would incur outside a global.

There were also discussions during the course of that day about how the plaintiffs were going to get the benefits of the Home insurance policy that was being put up to cover Fibreboard's responsibility.

There had been also an element of this deal by which Fibreboard was going to agree to handle the processing of claims for some period of time, and there were what seemed like endless discussions about how long a period that was going to be for, what it entailed, and -- and what was involved.

And, frankly, it seemed like every time we resolved one problem, there was another problem waiting in line to -- to -- to be resolved right after the one that had been -- had been fixed.
Q. Was one of the issues the cutoff date as to when the plaintiffs class should be deemed to commence?
A. Yes.
Q. What was that?
A. There was a fight about whether -- whether it was effective after the 27th or effective the 27th.

Q. With Continental's position being that in essence the deal had been struck the previous -- A. That's right.
Q. -- night?
A. We agreed on -- as far as -- we were concerned we had agreed on a price the previous night and it shouldn't be affected by people dumping claims on the 27th.
Q. Now going back to the discussion that you were referring to that took place that day between Continental and Pacific on the one hand and Fibreboard on the other, for I guess what had come to be called a trilateral which the plaintiffs were insisting upon, is it correct that in those negotiations it was the position of the insurance companies that they were not going to pay one penny more in total than they had agreed to pay in the global context?
A. That's correct.
Q. And can you amplify a bit more just what Fibreboard's position was with respect to that?
A. Fibreboard's position was that it needed to get a significantly larger amount of money than that because there would be defense costs outside the global. And that inside a global, the vast bulk of the money was going to be for indemnity, that even the indemnity amount outside a global wasn't the same as inside a global, because of the vagaries of the tort system, and that in any event it was going to cost Fibreboard a great deal of money beyond that just to keep the amounts to that indemnity amount, and therefore it couldn't agree without getting a very much higher number which showed or reflected the defense costs. Not dissimilar from the analysis that -- that -- that the court has heard in prior testimony comparing the way trilateral works to the way the global works.
Q. And what was the response of Continental and Pacific with respect to those arguments?
A. We weren't prepared to do that. We had not been prepared to enter into a trilateral on that basis during the summer and avoid all the interesting experiences that we had with plaintiffs'

counsel, and we weren't prepared to do it having -- having gone through the global negotiations.
Q. And did a point come on that day of Friday, August 27, where Fibreboard ultimately caved in?
A. Well, Fibreboard and Continental ultimately agreed, along with Pacific, on a formula for -- for trilateral pricing which was from our point of view not going to cost us more than -- than the global would cost, but from Fibreboard's point of view got them some additional dollars beyond the billion five thirty-five.
Q. And was that --
A. Billion five twenty-five.
Q. And is that the formula that was ultimately recited on the record when the parties eventually went on the record that day?
A. Yes, it was.
MR. WACHTELL: Your Honor, I refer to page 17 of the transcript, the second element of price would be with respect to the future cases, and there we agree that the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it:
The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount, since interest is going to commence accruing today, and it is the net amount of that interest, if there are any taxes that would come off, that the entire amount plus the net interest would be devoted to the bilateral, and in addition the cost of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of plaintiffs' counsel, the notice costs that we are agreeing to, and in addition there is an obligation under the April 9th agreement to pay the counsel fees of Brobeck in connection with the global, to the extent any of those costs are saved that could be a relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Q. And was that the essence of the understanding that was reached with Fibreboard that day, as was then recited on the record?

A. Yes, it was.

Q. Was anything learned during the course of that Friday, August 27th, with respect to what had transpired in California that morning, California time, on the final arguments of the coverage case appealed before the intermediate court of appeal?

A. Yes. As one might expect, we got a report from the -- from the participants in arguing the last phase of the appeal, and the report was that the information we had been getting from Fibreboard, namely that the California court of appeal was likely to hand down a decision, if not instantly, then close to instantly was in fact accurate, because we got a report that the court announced from the bench that it was intending to -- to hand down a decision imminently.

Q. Was agreement ultimately reached on these various items that you have testified were being threshed out during the course of that day, Friday, August 27th?

A. Yes. By the time sometime around 5:00 in the afternoon, the parties seemed to feel that they had reached agreement on enough points to be able to announce a settlement on the record.

Q And that is the transcript of that date, and Your Honor, I refer to the exhibit number, Fibreboard 592. Is that correct?

A. Yes, its.

Q. Was any communication then made to the California court with respect to the appeal that was then sub judice before it?

A. Yes.

Q. What happened?

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the course of those negotiations?

THE COURT: By anyone other than Mr. Wachtell?

[Laughter]

MR. WACHTELL: Thank you, Your Honor.

A. Well, yes. Total peace was -- was -- if you'll forgive the expression -- a war cry that was heard throughout the negotiation. And there was, I suppose, to no surprise, people who listened to the negotiations, there was not an agreement on what total peace meant.

Q. Total peace was term entered in the record on August 27, is that correct?

A. It was a term used by you in describing the settlement on the record.

Q. Without contradiction, is that correct?

A. There was no contradiction, as I recall, on August 27th.

Q. And was a resolution ultimately reached on this question of all other conceivable claims under the policy being cut off by the settlement as well?

A. Yes, it was.

Q. And what other come to your mind that proved most tenacious and most difficult to resolve?

A. Issues were -- were raised with -- with respect to who was going to bear the risk if there were -- if there were parties that needed to be cut off who for one reason or another the court could not issue an order cutting off. It won't surprise anyone for me to say that the plaintiffs were not particularly interested in -- in dealing with -- with the risk of those. And it was the position of -- of the insurers that what we were getting for our billions of dollars was -- was total peace. And therefore claims that could not be cut off would have to continue to be at plaintiffs' risk, not ours.

Q. And was that ultimately resolved?

A. That was ultimately resolved.

Q. By a compromise on formula?

A. Yes. There is a provision with respect to most of these claims, plaintiffs will have to reduce judgements. And then there

are another -- there's another narrower category of claims, but it's all clearly reflected -- amend that -- it's all reflected in detail in the global settlement agreement.

[Laughter]

Q. I hope it's clear. Were there discussions with respect to what would happen in the event there should be any sort of successful collateral attack on the -- on a prospective judgement approving the

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1494-1496

portfolio before most of the participants in the room learned really what it was the insurance companies did not want them to be permitted investments. There were many days and very long nights spent looking at how to craft spendthrift restrictions. These were not provisions that were simply lifted from somebody else's agreement someplace else, they were crafted from scratch, they were custom designed to deal with what the plaintiffs expected would be likely claims and claims flow against this trust. Runs were made to test how they worked. When they didn't work as well as plaintiffs might have liked because they viewed them as too restrictive, we renegotiated those provisions until we got them to a point that people were satisfied with, leading to some of the complicated formulas that are attached to the trust distribution process.

Q. Why did it make any difference to the insurers or to Fibreboard, for that matter, whether there were or were not spendthrift provisions in the trust or what they were?

A. Unfortunately, as the parties were aware, trusts that had been set up in other contexts to deal with mass tort claims, and particularly asbestos claims, had not always worked to make sure that the interests of the people who came along later in line were as well protected as the interests of the people who came along

earlier in time. Fibreboard and the insurance companies wanted to make certain that we weren't just putting up a sum of money here that would last for a relatively short period of time because of what came to be described by the shorthand term "field of dreams," that is, if you build a billion-and-a-half dollar fund, the claims will -- the claims will come, especially if you created claimant-friendly processes as we were attempting to do in connection with the trust such that it was -- it was easy to -- to file a claim and -- and get one's claim resolved. We were concerned that if there were no restrictions that the funds could be depleted in the early years, because the trustees were too generous in terms of settling claims, because the trust was ambushed in jurisdictions that were not friendly to the trust, that, as I described, a lot of claims came out of the woodwork that would never have appeared but for the existence of this billion-and-a-half dollar fund. And we wanted to make certain that a mesothelioma claimant or an asbestosis claimant who might come along 10 or 15 or 20 years from now would find that the fund still had money, was still capable of compensating that victim because we don't want and don't intend and this field is designed to make sure that such people can't come back and knock on the door in Walnut Creek or in Chicago, Illinois, or is it Saddle River, New Jersey, where Chubb is?

MR. BSCHOOR: That's good enough for your purposes.

[Laughter]

MR. WACHTELL:

Q. For the record, Chicago is the headquarters of Continental Insurance; is that correct?

A. Yes, it is, Saying, "What have you done for us late?" This is meant to cut all the claims off. And we felt that one of the essential steps in doing that was making sure that the fund was managed in a rational, fair and equitable fashion to make sure that no matter when somebody came along in time that person had a

reasonable expectation of obtaining fair compensation from the trust.

Q. When was a formal global agreement actually executed?

A. It was -- I can only say when Continental executed it, because there may have been people who put their signatures on the documents earlier in the

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1500-1506

that the fund was going to be equitably distributed, that being one of the factors that the courts look to under 23(b)(1)(B) as for reasons for utilizing 23(b)(1)(B)?

A. That is assumed within my -- within my statement that we felt that it had to be viewed being entirely fair and equitably distributing the fund certainly is one of the elements of -- of what we needed to be considered in connection with 23(b)(1)(B) and the fairness.

Q. Following up on that issue, you've referred to the fact that you wanted to make sure that later claimants had a reasonable expectation of obtaining fair compensation. Is there any certainty under this agreement or this trust distribution agreement that all claimants who may come forward in the years and decades to come will in fact receive compensation?

A. I'm not sure that other than death and taxes there's any certainty to anything in life. And there isn't -- there isn't absolute certainty with respect to this either. I think there is likely, because of the way this -- this operates, there is likely to be some amount of compensation for the most seriously ill people; but if for some reason, despite everybody's best expectations, mesothelioma claims were to -- to total a hundred thousand mesothelioma claims, I'm not aware that this trust, this fund or frankly any fund would be adequate to -- to provide them with historic amounts of compensation.

Q. Was the position of the insurance companies, Continental and then ultimately Pacific as well, in negotiating toward this $1.525 billion that they were going to be paying in the money for, that they were guaranteeing that everybody would ultimately be paid who came forward with a claim?

A. No.

Q. Can you tell us what the negotiating position of the insurance companies was?

A. We didn't -- we didn't and don't today know how many claimants there will ultimately be. I think the insurance companies, certainly Continental, is not settling here because it's concluded that there will likely be less than a billion-and-a-half worth of future liability for the insurance companies, certainly in the tort system, that -- that we are hopeful that there will be enough money to pay everybody, but, frankly, we don't know and we're not making any representations, and haven't, including in the negotiations that we had with plaintiffs, that this amount of money would ultimately, with 20/20 hindsight, prove to have been adequate to cover every claimant who has -- who has a claim against Fibreboard.

Q. Is it fair to say that the position of the insurance companies were that they were looking out to what their potential exposure should be were they to lose the coverage litigation, looking to the potential likelihoods of success or failure in that coverage litigation, and deciding that they were willing to pay a sum of money that represented a compromise and settlement of all of these factors?

A. That -- that is indeed a fair statement.

Q. Now, does the final global agreement as entered into between the parties, the formal agreement that is before the court, have anything in it about a possible incremental contribution to the trust fund should there be savings off a target figure on presents as you've previously testified was contemplated on August 26th and August 27th?

THE COURT: Counsel, I didn't follow. Say that again.

MR. WACHTELL: Let me try it again.

Q. You've indicated, Mr. Koplow, that late at night on August 26 that the insurance companies not only went up $25 million --

THE COURT: Talking about the 80/20 deal?

MR. WACHTELL: That's right, Your Honor. That's what I'm alluding to.

Q. Does that 80/20 deal, as you previously described it, appear in the final global agreement?

A. No, it does not.

Q. And can you tell us what happened to that along the negotiating trail?

A. That -- that deal proved to be one of the more difficult elements from -- really, from the very beginning, because we knew that when we discussed it on the night of August 26th that while Continental had a target unsettled present settlement figure, that was our best estimate, on August 27th, of $350 million that some of those unsettled present claims involved claims in which the Ness Motley firm was or could be involved, because not -- not every firm with whom they had an affiliate relationship was included in the Ness Motley deal, and indeed Ness Motley itself, as I recall, was not under an obligation to put all of its claims into the deal. There were a number of firms with which they had traditional relationships where when called upon to try cases they could and would be called upon that they did not feel they could break those -- those commitments to such counsel, and that therefore we would have to go through the list of unsettled present claims, identify the claims where there was a Ness Motley involvement, and remove those claims from -- from the deal. That is, from the -- the 80/20 deal. And that would necessitate putting values on those particular claims. And while the overall number was $350 million, there, I can't say that that number was reached by assigning a precise settlement amount to each and every claim. There were a lot of rough adjustments that were made. As soon as we sat down to try to -- to customize the $350 million, as it were, we ran into -- we ran into great difficulty, because every time -- this was a dynamic process. And every time an unsettled case became a settled case, it improved the information base for you to estimate what other unsettled claims were going to cost, in particular jurisdictions or with particular counsel, and so we were dealing with a number that was constantly moving.

At the same time -- at the same time, there were other problems that presented themselves that we hadn't anticipated on August 26th when we struck this deal. One of the problems that the court and counsel would be familiar with is the fact that some 4,000 Baron & Budd claims got filed on August 27th with the claim that they were present claims, not futures. Those claims were not included in any of the estimates that we had for unsettled present claims. Not surprisingly, Continental took the position that they were future claims, seeking vigorously to represent the interests of the class, class counsel said, "Well, they're not gonna be futures claims, we want you to pay them." That developed into a major dispute. And when it became apparent, as the negotiations wore on through the fall of 1993, that there weren't going to be a very substantial amount of savings in any event on the unsettled present cases, we decided on a substitute method to -- to provide both a solution to the Baron & Budd case dispute, which we were prepared to litigate fully to demonstrate those cases were -- were future cases by agreeing essentially that we would split the cost of those cases with the trust, which was a benefit of as much as $15 million or more to the trust, or so we thought at the time, and take out the 80/20 deal because it had just simply proved to be too difficult to -- to document, and in doubt. And I might add that as things turned out, it turned out to be a better deal for -- for the trust, in my view, than -- than -- than for Continental, because even under the most optimistic estimate of the unsettled presents cost, my understanding is that today the Fibreboard estimate, which is much lower than Continental's, is about $330 million, meaning that at most it would have been $20 million in savings, 80 percent of that would have netted $16 million for the trust under the best possible case, and my own view is that it is highly unlikely that there will be any savings on unsettled present cases.

Q. Now, what is your understanding of the interrelationship between the global and the trilateral agreements? Is the trilateral simply --

THE COURT: Before we get into that, counsel, why don't we take our morning break. Tell me how much longer you expect to be with Mr. Koplow.

MR. WACHTELL: I would think under an hour.

MR. BARON: Your Honor, while we're doing that, could he tell me what other witnesses they have today?

THE COURT: I trust he can. Mr. Rice has suggested that the court might have a

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cropped up after August 27th.

Q. And can you tell us what the problem was, briefly, and what was done about it?

A. Well, I can tell you what was done about it. Plant had been the exclusive distributor for Fibreboard products in northern California and I believe Nevada or a part of Nevada for a long period of time. And they claimed to have a contractual indemnity from Fibreboard. They also, we learned -- that is, Wachtell Lipton learned -- after August 27th had made claims to be an additional insured under the -- the Continental and Pacific insurance policies, additional coverage case. And in view of the fact that we could not settle for the amount of -- the amounts of money we're talking about and then still have to deal with additional claims from Plant that after all only arose because of Fibreboard's situation, we had to deal with -- with the problem of resolving the Plant liability.

Q. And was that resolved in the context of the global settlement agreement?

A. It has been resolved as -- as part of the complex of agreements that today constitute the global settlement agreement.

Q. Now, there's been testimony about the California Court of Appeals having reversed a previous judgement of the lower court

in favor of Fibreboard and against Continental in the Andrus matter. And has there been any further court proceedings, to your knowledge, in Andrus with respect to that reversal?

A. Yes. Last week the California Supreme Court denied review in Andrus, which means that the court of appeal decision will -- will not be reversed.

Q. That is a final judgement in Continental's favor, is that correct?

A. It's been remanded to the district court, as I understand it, consistent with the previous decision of the court of appeals.

Q. And what is the significance of that judgment against Continental and in favor of Fibreboard in the Andrus matter, as you understand?

A. Well, its significance to us is that there is now a final decision that affirms that Continental, during the period of the interim agreement, was -- was in compliance with its obligations to Fibreboard under the insurance policy and that all of the assignments that were made allegedly grounded on Continentals failure to meet its obligation to defend them to the insurance policy were breaches of -- of Fibreboard's end of the insurance contract.

Q. Is it correct that the policy by its terms barred Fibreboard from settling without Continental's -- entering into settlements without Continental's consent?

A. That's what the policy says.

Q. And when you say that these assignments constituted breaches, is it Continental's position that given the magnitude of the assignments and the consequences of the assignments, including as how they have been spelled out in the courtroom, that the breaches are of such magnitude and massive nature as to relieve Continental of any obligations under the policy?

A. That would certainly be -- be our position even if -- if the global settlement and trilateral settlement were not to obtain the requisite court approvals and Continental lost the coverage case, it would still be our position that because of Continental's actions we had no further obligations under those policies.

Q. Fibreboard's actions?

A. Fibreboard's actions, we had no further obligations under those policies.

Q. Was this a risk in terms -- from the vantage

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determines to take his or her claim to -- to trial, which, of course, is the factor that has the potential for really causing the trust expense. And the theory behind this was that if in fact the trust made fair settlement offers, fair and reasonable settlement offers, they would be accepted at a very early stage, thereby eliminating the expenses to the trust that are entailed by carrying a claim along and into the litigation process.

Q. So that the structure of the trust is designed to minimize defense attorneys' costs as well as to cap plaintiffs' attorneys' costs, is that correct?

A. Well, it's designed to require a very small number of defense attorneys, if any, in the process.

Q. You do refer to the potentiality, if the various settlement steps do not achieve settlement of the plaintiff taking a case to trial, and I take it by that you're referring to this back-end opt-out position as has been referred to in the global settlement agreement.

A. That's correct. That's something that the plaintiffs insisted -- plaintiffs' lawyers insisted from day one as a part of any deal.

Q. And you talked about the trustees offering hopefully fair and reasonable settlements so as to obviate litigation.

A. Well, they're incentivized to do it, because if they don't offer settlements that are viewed as fair and reasonable, they're simply going to find themselves with those claims in the tort sys-

tem and the trust saddled with all the costs and disadvantages entailed for the trust by ending up in the tort system.

Q. I take it that means, then, by that token that the trustees are not going to be in a position arbitrarily to impose less than fair settlements; is that correct?

A. That's right. That's a safeguard that operates here.

Q. But a corollary of that also is -- and this goes to your prior testimony as to whether there was any guarantee or assurance that the amount of money in the trust would suffice to pay all claimants. The corollary of that is that the trustees cannot control the amount that they will pay out against claims, is that correct.

A. They don't entirely control it, that's right.

THE COURT: Well, they don't entirely control it as it relates to that portion of cases that may wind up in the tort system.

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impossible for plaintiffs to make a case, you could wind up 20 years from now with a vast amount of money left in the trust and no one to pay it to.

Between those extremes, if I follow your testimony correctly, it's your view that the probability is -- the great probability is we won't have drastic changes and that the safeguards should provide ample funds to take care of anticipated needs.

THE WITNESS: The wild card in that, Your Honor, is that I have never achieved -- speaking for myself alone, throughout this entire process, I've never achieved a level of comfort that anybody can really know what the total number of future claims will be. If the number of claims are the kinds of numbers that -- that people anticipate based on Dr. Nicholson's work, and

he does now have some tract record to go on, and if the numbers are--

THE COURT: If meso cases really are a measure?

THE WITNESS: Uh-huh. Then one, I think, could reasonably expect that this would be adequate. But there are a number of things that could happen that could change that. The propensity to sue could go up. That would affect the claims numbers. The settlement is not a settlement that affects only claims in the United States of America. If someone were to find a way to -- to mine meso claims around the Subic Bay in the Philippines or another Pacific location where the Navy used a lot of Fibreboard product, for example, we could see a source of claims that I don't believe is really worked into anybody's claims base. And there's just no way, as we sit here today, to know whether that will or won't happen.

Likewise, we could -- we could turn out to have substantially fewer than the 186,000 claims that we used as a basis, which was at the high end of Dr. Nicholson's projection, not at the low end. So it's difficult -- I'm obviously not endorsing the court's invitation to opine on the adequacy in terms of what will happen in the future, because there are a number of wild cards here that one can't know, but --

THE COURT: Well, if the future holds a change in products liability law that makes it much more difficult to secure compensation, it occurs to the court that the future claimants under this trust agreement may very well be better off than future claimants in the tort system, because they at least have the mechanism here to secure compensation.

THE WITNESS: There's no question about that, Your Honor.

THE COURT: Now you can put on your bankruptcy hat.

MR. WACHTELL: Before he puts on his bankruptcy hat, let me ask another question which ties in with what we've been talking about.

Q. Is it correct that there was a very recent amendment entered into among the parties to the trust distribution agreement?

A. There have been several recent amendments. And if I'm being offered the opportunity to speak about them, let me --

Q. Feel free.

A. -- let me talk about them generally. First of all, while a great deal of work was put into creating the spendthrift provisions that we originally had, it did occur that as people ran the numbers through the Cornell model, which Your Honor will hear about a little bit later in this proceeding, there were a disturbing number of scenarios in which the spendthrift operated to delay payment on early claims that ultimately got paid after being delayed for a while, while still leaving a considerable amount of money left -- considerable amount of money in the trust at the end of 60 years. Obviously that was not a result to be desired. And in looking at -- at potential solutions that the parties, largely at plaintiffs' instance, came up with a way to loosen up the restrictions or give the trustees some discretion to loosen up the restrictions somewhat so that earnings from the second run of $200 million could be brought up to deal with earlier claims if indeed there were extensive delays provided that the trustees were able to satisfy themselves that this was not going to prejudice the rights of later claimants. So there would be more of a dynamic later look at what experience was telling us would be the likely volume and flow of future claims. And so that amendment was made.

In addition to that, another device was crafted to deal with the problem of there being more claims than anticipated and the delays that those claims might face by giving the trustees the ability to make one-time offers to people waiting in line if there had been delays --

THE COURT: Similar to Robbins?

THE WITNESS: I'm not familiar with how the Robbins mechanism works, Your Honor, but if somebody felt that taking a $3,000 payment immediately rather than 5,000 or $6,000

that might still be delayed over a period of years was advantageous, the trustees could clean up the claims that way.

In addition to that, there were a number of technical changes that over time seemed to be appropriate. The parties were overly optimistic when we drafted these documents as to how long the notice process and approval process might take, and had created a situation with the -- with the spendthrift mechanism so that if it took us two to three years from the time we originally negotiated this deal until the trust was cleared to start paying claims because we had received final judicial approval, we had only made one year's worth of principal available to deal with what would be a backlog of claims. And so we made the logical fix, which was to permit the trust fund to be viewed as having started back on January 1, 1994, and if, for example, you weren't to obtain the ability to start paying claims until January of '97, you would have three years of principal made available. That was a technical change.

There's also a provision in the -- in the trust distribution process that allows the trustees to make or deal with something called an expedited review option. If someone, for example, has a pleural claim and wants to have expedited treatment from the trust, the trustees have the ability to say people who file this abbreviated claim form nevertheless establishing disease and exposure, but with a good deal less information than the normal process would entail, we will send 250 or 500 or whatever the amount of compensation is immediately without the need to wait in line or go through the entire claims review process.

A question was raised as to whether we had made it impossible for that to be done if there were people waiting in line. That wasn't intended -- it wasn't intended to work that way. And so that was -- that was cleaned up.

I'm trying to think on whether there were any additional items covered by the amendments. If I had the notice document, it would be helpful. But I'd be happy to explain the reasons behind any of the others.

Oh, yes, I heard the initials SCB, and that jogs my memory. Originally the select counsel for the beneficiaries was a five-person group. As part of our desire to have this deal perceived as fair by the broadest possible constituency, when organized labor took a look at what we had brought here, it expressed the concern that it wanted to have an opportunity to directly monitor the ongoing operations of -- of the trust for the benefit of its members, and asked to have a seat on the SCB. The parties viewed this as a reasonable request and one that would allay fears of union members that this was a deal that was not in their best interests. And so we expanded the SCB, and it was necessary to add yet an additional seat so that we didn't end up with ties on the SCB. But that change was made as well.

Q. Was there likewise a change made with respect to statute of limitations concerns?

A. Yes. We had meant originally to -- to make sure that no one with a claim that was not time barred on August 27th found themselves time barred against the trust in the future, but that provision did not find its way into the final documentation last year. That was one of the amendments.

Likewise, we had all had a recollection that we were to have included a provision in the documentation that treated all claims filed before the global was finally approved by the court as deemed filed on the same day, because there are -- there are advantages to being first in line. We didn't want anybody to have an advantage because they were able to get a claim form first by going to one of the class counsel in this case. We wanted there to be no suggestions that anybody could possibly been favored with respect to getting in line, and so we wanted all claims treated as filed on the same day for the cue purposes. That change was also -- was also effected so that the provision now does appear in the documents.

Q. Putting on your bankruptcy hat, Mr. Koplow, at any time during the negotiations which ultimately led up to this global settlement agreement, did Continental ever focus on the issue of

whether there was some means to put Fibreboard into a bankruptcy proceeding and attempt to accomplish the same kind of goals that the global settlement seeks to accomplish through the aegis of the bankruptcy laws or under the aegis of the bankruptcy laws?

A. We looked at everything that we could think of. And this was certainly one of the things that we thought of. And the conclusion of experienced bankruptcy counsel was that it simply could not be done. The requisites for -- under I believe it's section 303 of the Bankruptcy Code of 1986 which mandate that there be three creditors that have claims that are due and unpaid and are in the aggregate unsecured to at least the extent of $5,000 simply could not be met. Fibreboard had very carefully structured all of its settlements, including the post-'59s, so that payments were not due on them. And they were paying their other creditors in a timely fashion. And so they could not properly have been put into an involuntary proceeding. Other buyouts were by plaintiffs.

Q. At any time during the negotiations which led up to the global settlement agreement, did any of -- this is before or after formal designation of negotiating counsel as negotiating counsel, or after preliminary class certification and prior to the December 23rd of 1993, at any time during this process did any of the plaintiffs' counsel ever ask for a special deal for their present cases as some sort of a quid pro quo for agreeing to a global?

A. No.

Q. Now, you have testified several times --

A. May I add to that answer, Mr. Wachtell?

Q. Sure.

A. I would simply like to add that had any such request been made, it would have caused Continental a very serious problem in continuing to negotiate with that counsel as a member of the group. We were intent on and have remained intent on making certain that there were no extraneous threats to getting a global settlement approved here. And --

Q. Threats or inducements?

A. Threats or inducements.

Q. Now, you have testified, I think, on several occasions that at one or more points during the negotiations, plaintiffs' counsel were taking the position that the only thing to be negotiated was the Ness Motley agreement; is that correct?

A. That is correct.

Q. And I think you have indicated that that position was being maintained not merely by the Ness Motley attorneys, Messrs. Rice and Cox, but was being adamantly maintained by Messrs. Kazan and Wartnick as well; is that correct?

A. Oh, yes. They're the ones who refused to sit down and discuss anything with us.

Q. Did you deem that that refusal or that position on behalf of these plaintiffs' counsel was designed to secure some special advantage to the Ness Motley firm or their clients?

A. No. We viewed it as a very affected, and frustrating to us, negotiating ploy.

Q. Can you explain?

A. The Ness Motley settlement, which had been the subject of a lawsuit seeking its approval in this court, created a -- a massive amount of pressure on Continental Casualty Company. And the reason for that is that --

Q. When you say -- you mean the initial Ness Motley settlement?

A. The initial Ness Motley settlement.

Q. Continue.

A. The fact is that the Eastern District of Texas has had some of the largest, if not the largest, awards against Fibreboard. In taking a look at the reasonableness of the settlement amounts in that agreement, it was hard for us to see how this horde could simply forget about the prior settlements or verdicts in the Eastern District of Texas, that albeit those were vastly higher than -- than Fibreboard historic settlement values, it put Continental at a great disadvantage in terms of its ability to be able to get those amounts down. It was plain as day, Mr. Rice and Mr. Cox stated it from

the earliest meetings I can -- I can recall with them to discuss the Ness Motley agreement and to discuss the global, that they were not prepared under any circumstances to have some deal done for their clients and then say, "We're starting with a clean slate with respect to pricing on the global." It was very clear to us that to the extent we couldn't get the Ness Motley pricing down, that we were going to end up with -- with an expensive global settlement. And that is precisely what happened. I think that's exactly what -- what Messrs. Rice and Cox and Messrs. Kazan and Wartnick intended to have happen when -- when they insisted on having the Ness Motley agreement be the only subject of discussion when we did not put a number on the table for a global that they found to be acceptable. And there's no question in my mind that the consequence of all that was -- was that we have a more expensive global settlement than would otherwise have been the case.

Q. Is it correct that in the original initial Ness Motley agreement that Continental was facing numbers on an assignment basis that had been entered into by Fibreboard of approximately $18,000 per pre-'59 claim?

A. I don't remember the precise number, but that's the neighborhood.

Q. And is it correct that that was also facing interest on unpaid balances which had been fixed between Fibreboard and the plaintiffs at 10 percent?

A. We had the problem with the interest, we had the problem of the contribution cutoff order that -- that had to be granted in connection with the Ness Motley settlement that would have cut off our rights against Pacific, not only with respect to that settlement, but with respect to everything. And there was no question that it was an expensive deal in an expensive jurisdiction which probably would have had some difficulty discounting its prior experiences in Fibreboard in adjudicating the reasonableness of those amounts.

Q. So you're saying that in your estimation in negotiating for the second Ness Motley agreement, Continental did not have the

luxury of negotiating on a clean slate but was operating under the threat of what would happen to it in that litigation and what the likely outcome or possible outcome of that litigation would be if it could not enter into the second Ness Motley agreement; is that correct?

A. There's no question Continental found itself in a difficult position, and that position was exploited by class counsel.

Q. Exploited by class counsel first to get higher values for Ness Motley and second to use those values to ratchet up the values being used in the global, is that correct?

A. That's correct.

Q. Do you have a view as to -- maybe this is implicit or even explicit in everything you said today, but do you have a view as to whether class counsel got everything that Continental and Pacific were prepared to pay as a price for global settlement agreement?

A. I'm not aware of anything that -- that Continental had left that wasn't extracted from it. And based on -- based on my experience in -- in getting permission to go up from the billion five, I can't imagine that there was anything that Continental was -- was holding in reserve. And I believe that -- that we had a contractual commitment to -- to Pacific from August 22 on not to go above a billion five, which was the result of our having told Pacific that we were quite certain that that would be it and that frankly we weren't prepared to go above that number.

Q. Let me cover just one technical matter, and I'll do it by a leading question, having to do with

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1547-1550:

CROSS-EXAMINATION BY MR. BSCHORR

Q. Just a couple of small areas, Mr. Koplow. You indicated, just to clarify the record, you used the term in connection with I

think it was claims that were being filed around August 27th, you used the words "dumping claims." Did you mean by that that at about that time there were a number of plaintiffs's counsel that were rushing to the courthouse to file a lot of causes which ultimately became known as what we call the surge in cases?

A. That -- that term as I used it was meant to -- to refer to that. With respect to the claims filed August 27th, it was meant to refer to filing claims in almost no matter what form the claims existed in order to beat a deadline.

Q. Including claims that might have had over a hundred pages of plaintiffs' names, just to get the cases filed, such as Mr. Jaques did in Cleveland?

A. I'm not aware of what Mr. Jaques did in Cleveland, but what you described certainly would fall within my meaning of the term "dumping claims."

Q. You previously were talking with Mr. Wachtell about the 80/20 situation and the arrangement that had been made on August 26th and 27th which was not followed through in the final global. Do you recall that testimony.

A. Yes.

Q. Am I correct that that entire issue of the 80/20 split and how to deal with it and how to deal with the Baron & Budd claims was an issue between Continental and Fibreboard which did not involve Pacific?

A. My recollection of the Pacific-Continental deal is that with respect to the present claims, Pacific contributed or agreed to contribute a flat amount; and so from that, it would follow that it should have affected Continental.

Q. You responded to a question from Mr. Wachtell that as far as CNA was concerned, and as far as you, as counsel for CNA were concerned, you were unaware of any representation by CNA as to whether this 1.535 million dollars -- billion dollars would be in fact enough to cover all the claims. Do you recall that testimony?

A. Yes, I do.

Q. Do you have any view, based on conversations you had with Pacific, including myself, as to whether we had any such representation concerning that subject?

A. I'm quite certain that no such representation was made or implied by Pacific at any time that there was a discussion or negotiation that I was involved in.

Q. Beginning in April of 1993 and leading through the discussions that you've previously testified about culminating in December of 1993, with the final global agreement, do you recall any position by Fibreboard with respect to the treatment of pre- and post- '59 claimants as to how they should be treated.

A. After -- after April 9th, with respect to pre's and post's in a global, I believe the Fibreboard position was that there wasn't a reason for differentiation.

Q. And is that -- is it not a fact that that position --

A. Other than -- I should correct that. Other than the way the mechanisms of the agreement would deal with those claims. So, for example, if there were an agreement that people would be paid historic settlement values, then to the extent there had been a differentiation there would continue to be a differentiation, but there was -- there was no suggestion by Fibreboard that these claims needed to be treated as though they were -- they were different types of claims.

Q. Indeed, it was Fibreboard's negotiating position that they should not be treated any differently, isn't that correct?

A. I believe whenever that subject came up, that was the Fibreboard view, but with the caveat that I placed on it.

Q. Yes. Thank you. Throughout the negotiations that you participated in with class counsel, am I correct that the law firm of Caplin & Drysdale was involved with the four class counsel in those discussions?

A. I -- yes, they were -- they were involved in those discussions. Obviously not every discussion we had involved everybody from every one of the players on the plaintiffs' side, but, yes, they were involved, clearly involved in the discussions.

Q. And you testified that in April 1993, at the end of April, there was a meeting at the Caplin & Drysdale office, and I take it representatives of Caplin & Drysdale were present at those negotiations.

A. Oh, yes.

Q. And many times thereafter they were also present, leading up to August 26, when I think you

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1557 - 1559

Q. I want to turn to another brief subject, Mr. Koplow, that has to do with the legal ethics area. You are aware that one of the objectors has presented testimony, at least in deposition, and will present testimony here with respect to legal ethics issues? Are you aware of that, sir?

A. Yes, I am.

Q. In addressing one area that was discussed with that expert, did there ever come a time that CNA on its own behalf for Continental and Pacific together determined that there was one cap amount of money available to be split between the presents and future claimants?

A. No, I don't think it would be fair to say that there was a time when the insurers concluded there was one capped amount of money.

Q. So there was no direct competition at any time between so-called present claimants or future claimants for individual dollars that were available from the insurers, is that correct?

MR. BARON: Your Honor, I object to that one. I don't believe he's laid a foundation for it.

THE COURT: Overruled.

A. With the caveat that there was obviously some overall cost to the insurers that they ultimately would conclude they

weren't prepared to exceed, I did not view the present claimants and the future claimants as being in direct competition.

MR. INSELBUCH:

Q. Indeed, as you sit here today, you do not know what the sum total of the expenses for the insurers will be; isn't that correct?

A. Unhappily, that is correct.

Q. And neither does Mr. Bschorr, isn't that correct?

A. I'd be shocked if Mr. Bschorr had better information on this than we did.

Q. Are you of a view one way or the other whether the plaintiffs' class of future claimants would have been better served had they been represented by lawyers, competent, able, hard-working lawyers who had no other involvement in asbestos cases rather than lawyers who indeed had involvement, even current involvement, in asbestos cases?

A. While I have no empirical data to support my view, I am confident that had we been dealing with counsel that did not have both the experience and leverage that this counsel had, that we would have been able to negotiate a deal that would have been less expensive to the insurers.

Q. Finally, I think you forgot one of the assets that does come into the trust. Do you recall under the global settlement agreement, if and when it is approved, that Fibreboard also was to assign to the trust any claims for contribution it might have that result from any and all present claims?

A. I -- I had forgotten that. That is correct, that's one of the trust assets.

MR. INSELBUCH: That's all I have, Your Honor.

THE COURT: Do you have any questions, Mr. Baron?

MR. BARON: One or two.

MR. SHAW: Your Honor, I have a few I can do now or after lunch.

THE COURT: How long will you take?

MR. SHAW: Just a very few minutes, Your Honor.

THE COURT: Why don't we wait till 1:30. I've got a telephone conversation set up for 12:30. Given the fact of the conversation of counsel relative to these prospective witnesses and the commitment that I have, I'm going to take an hour-and-a-half for lunch instead of the usual hour,

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1570 - 1576

A. I don't think, given the particular circumstances of this insurance coverage dispute, that -- that that was a particularly attractive prospect to Continental if an overall resolution could be reached at -- at a satisfactory price.

Q. So they wanted what you refer to as total peace, they wanted away from this problem?

A. Well, they were going to put up the kind of money that they've had to put up to resolve the problem, yes. They wanted and expected that they would have to have total peace.

Q. Well, if they could have gotten out of this litigation in the sense of being able to work out a settlement that would have cost them less money but they would have had to continue to process claims in the future, they might have been willing to do that, would they not?

A. If there were some degree of certainty that it would have cost less money.

Q. Okay. So the issue was really, and truly the bottom line, how much money were they going to have to pay to get out?

A. The bottom line was: Would they be able to obtain certainty at a certain price?

Q. In your deposition, you talked about Continental wanting to get out of this thing without a tail. What did you mean by that, "Without a tail"?

A. Without the prospect of additional claims coming back for Continental's account in the future.

Q. All right. For instance, you know what a 23(b)(3) class action is, do you not?

A. Yes.

Q. And that's one where claimants are given the right to opt out if they decide they don't like the terms of the settlement?

A. That's correct.

Q. Okay. Mr. Koplow, that was not a way that Continental could cut off their tail liability and get total peace, was it? It wasn't something that was an available option for them?

A. Not under -- not under the -- the circumstances that existed with -- with respect to the Fibreboard situation.

Q. Because the liability would be open-ended at the back end?

A. Well, because the liability could be open and because the only way that people were prepared to deal with Continental was under circumstances where Fibreboard's liability would be covered entirely through its insurance.

Q. Right. And you didn't want that tail?

A. For the kind of money that we are talking about, Continental was not prepared to do a deal that left it with open-ended liability.

Q. Because you couldn't estimate that liability. Right?

A. There was no way to know for certain what Continental's total liability would be in connection with that.

Q. Would it be fair to say, Mr. Koplow, that throughout the negotiations of what became the Ahearn settlement, not just Continental but all of the parties operated under the assumption that there was no way to know how many claims there would be in the future with any degree of precision?

A. I don't know what was -- I don't know what was in everybody else's mind. I know that we didn't think that there was a way to determine it. And I know that the plaintiffs took the position that if the class was going to take the risk of bearing the claims, that they were going to demand a significantly higher price than if that risk were left with Continental. And I believe they both demanded and got a higher price for it.

Q. Okay. So the plaintiffs agreed to take the risk of being wrong on the back end of the future claims that there might be more than what they had anticipated. Right?

A. That's correct.

Q. Now, in terms of the present settlements, the ones that were made for the Ness Motley group, that was an argument why they didn't want to include the presents in the class action, because they couldn't predict how much it would actually take to pay those claims. Right?

A. No. I don't think with respect to the Ness Motley settlement.

Q. Well --

A. I think I've testified about unsettled presents, and Ness Motley was not an unsettled present.

Q. You're absolutely right. I misstated that. In terms of after the Ness Motley agreement was settled, in terms of going forward with a presents unsettled and futures claims class definition, the plaintiffs' lawyers told you that they didn't want to do that because they couldn't accurately predict the amount of money that was necessary to pay the unsettled presents. Right?

A. That's correct.

Q. And they were unwilling to accept a risk that they might be wrong as to those unsettled presents?

A. I think that they felt that there was considerably more difficulty in dealing with them than there might well be in dealing with the future.

Q. They felt it was much more difficult for them to predict how much the 50,000 or so unsettled presents would cost than it

would to determine how much it would cost to pay for all the claims in the future forever and ever and ever. Right?

A. I think that -- that it is fair to say that, but not without focusing on the fact that there is a considerable difference in dealing with claims that are immediate and need to be addressed immediately than there is dealing with a bunch of claims that are spread out over a much longer period of time.

Q. The need -- what's the difference?

A. The difference is that the present value of those claims is -- well, to state it another way, if I've got -- if I've got 150,000 claims to be managed over a 60-year period of time, there are a lot of things that I can do with respect to those claims if in fact I'm off by 20 or 30 or 40,000 claims. I mean, even relatively short delays in paying some of those claims or spreading them out permits you to deal with them. If you're dealing with 40 or 50 thousand claims that are here-and-now claims that have to be dealt with immediately, it has much more of an immediate dollar impact. And if you guess wrong, then -- then it has a more serious impact.

Q. And so the present claimants, you couldn't spread out their payments, but you felt more comfortable in spreading out the payments to the future claimants?

MR. INSELBUCH: Objection.

A. I don't know whether you could or couldn't, Mr. Baron.

MR. INSELBUCH: Objection. Misstates the witness's testimony.

THE COURT: Overruled.

MR. WACHTELL: I have the same objection. It isn't a matter of spreading out those claims. Those claims are going to come in over 40 or 50 years.

THE COURT: Overruled. Go ahead.

A. Could I hear the question back?

MR. BARON:

Q. Well, is what you're telling me, Mr. Koplow, that in terms of determining how much you need for future claims, you have

the ability of spreading those claims out over a long period of time, and if you miss by 20 or 30 thousand, perhaps you can defer payment to some of them and spread it out over a longer period of time, than the problem you have if you have present claimants who are knocking on the door wanting to be paid today and they don't want their payments spread out?

A. It's not just the ability to spread them out. If you have 30,000 or 40,000 more claims over a 60-year period of time, Mr. Baron, depending on how those claims spread themselves, it may very well be no problem. But it may very well have been that -- I understand if the class plaintiffs took this position that with respect to existing, already-filed claims, they did not want to get into the business of affecting those claims or running into a situation where any of those claims might be delayed in payment.

Q. Okay. Was there ever a discussion of defining the class in terms of people who had already manifested asbestos-related disease as opposed to those people who had filed lawsuits? Do you recall such discussions?

A. I can't say with certainty that there never was

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1583-1589

Fibreboard and resolving their problems?

A. I think -- I think that Continental was considering all sorts of things at the time, Mr. Baron.

Q. Well, was that one of the items that they were considering, going to Fibreboard and just getting a buyout of the policy?

A. As of March 10th, I do not know the answer to that question. I know that when the subject came up, which it did again intensively in late May and early June of 1993, this was not treated as if it had been carefully considered and carefully rejected in the February/March period.

Q. Okay. Now turn to, if you would, the document under tab 21, which is a letter dated May 12th, 1993, from Mr. Wachtell to Judge Higginbotham again. And so that we can have context -- well, first, did you participate in reviewing this letter, putting it together?

A. I don't have a specific recollection of putting the letter together, but I -- I would be shocked if I -- if I hadn't played a role in it, given what I was doing at the time.

Q. All right. Turn to page 6 of the letter, if you would, under the heading "mandatory class action," and specifically, if you would, look at the second paragraph. Are you with me?

A. Uh-huh.

Q. I'm going to read the first sentence or two: "Continental is aware that plaintiffs perceive both legal and political problems with structuring the settlement as a mandatory non-opt-out class." Did you perceive those problems, you, yourself?

A. Well, I understood from -- from plaintiffs that -- that that was their view; that is, that a mandatory non-opt-out class action was traditionally not the kind of thing that was greeted with open arms by members of the plaintiffs' bar dealing with -- with tort actions.

And with respect to the legal issue, as you well know, the plaintiffs made every argument they could think of as to why this would be a much more difficult route to follow.

Q. Okay. Turn to page 15 now, if you would, please. I turn your attention to paragraph 6, numbered 6, concerning this report that Mr. Wachtell provided to Judge Higginbotham. He states: "Any political problems can be ameliorated to the extent that plaintiff's representatives could be deemed to be acceding to a mandatory class structure at the strong urging of the judiciary." What did Continental, through their representatives, your law firm, mean by that?

A. That -- I think that the language is self-explanatory on its face, but certainly what it was intended to convey was that it would be easier for the plaintiffs' lawyers to explain what they were doing

if they were able to indicate that this was something that had been urged upon them by Judge Higginbotham.

Q. Okay. And Continental felt it was important to convey that to Judge Higginbotham, apparently.

A. Well, obviously, we felt that it was worthwhile putting it in a letter that went to the judge and that went to plaintiffs' counsel.

Q. Do you know whether a copy of that went to Judge Parker?

A. [Pausing]

Q. Do you know?

A. I don't know whether it went to Judge Parker or not.

MR. BARON: You know, it would be a lot better, you would give better answers if Mr. Wachtell wouldn't be nodding up and down all the time.

MR. WACHTELL: I apologize. I think I was nodding sideways, not up and down.

MR. BARON: I apologize.

THE WITNESS: It had no effect on my answer.

MR. BARON: I'm sure it didn't

Q. Would it be fair to say --

A. I think it would be fair to say that had it gone to Judge Parker, he would have been cc'd on the letter; and as I think you know, he was not.

Q. All right. Well, would it be fair to say that at least by the time that letter was written in May of 1993, Continental, based on the statements that were made by Judge Parker and the material that was being reported to Judge Higginbotham, had a high degree of confidence that if they could work out a settlement that was a 23(b)(1)(B) settlement, that in terms of the legal problems involved they would have a not terribly difficult time with the district court approval of the 23(b)(1)(B)

A. I don't think that's correct at all.

Q. So even though Judge Parker had indicated in a pretrial that he thought 23(b)(1)(B) could be used, should be used, and even though Judge Higginbotham, as you've testified earlier, was urging the parties to go forward with a settlement of this basis, Con-

tinental was concerned that the courts might not approve the legal foundation of the settlement?

THE COURT: Counsel, you keep using the word "should." As I heard the letter, it used the word "could," did it not?

MR. BARON: No, Your Honor. I'll read it again. Says "Chief Judge Parker informed the parties at a status conference before him on March 10, 1993, that he believes that a global settlement should and can be achieved by the use of a mandatory non-opt-out class action." Again, whether it's an accurate reporting, I don't know, but that's at least what the position of Continental was in the letter.

A. The difficulty I have with your question is that, one, it sort of collapses time frames. My prior testimony about -- Judge Higginbotham I thing relates to a period of time around July 13th, which is well after the time frame that we're dealing with here; and second of all, I think we understood at all times that what the district court might approve and the Circuit Court of Appeals might affirm depended to a large degree on -- on all of the facts and circumstances of -- of the global settlement. And -- and I don't think anybody, in any of this correspondence, has suggested anything to the contrary. And at this point in time, a global was nothing more than a gleam in Continental's eye.

Q. But at least they've had some level of confidence that the legal theory to implement a global on a non-opt-out class would be welcomed by the district court?

A. I think that we knew at the time, to the extent there were positions on the law in prior cases that had been taken by Judge Parker, what his views of the law were, just as we knew what the views of the law were of other district court judges and what the law was with respect to 23(b)(1)(B) in various circuit courts around the United States.

Q. All right.

A. And there is -- as you well know, the standards are not uniform from circuit to circuit.

Q. Okay. Now let's talk for a moment about Fibreboard's objectives and what they were attempting to do here. What did you consider to be the primary objective of Fibreboard in these negotiations in terms of end results?

A. I don't think -- I don't think that there was any secret about it. Fibreboard's objective in the negotiations was to shed its asbestos liabilities without having to spend any of its own assets in doing it.

Q. And that's ultimately what happened, isn't it, if this settlement is approved?

A. That is ultimately what will have occurred, with some small exceptions.

Q. So the bottom line, then, if you really add up what's happened, would you agree with me that if this settlement is approved, Continental is able to dollar out its obligation once and for all to asbestos victims of Fibreboard and to Fibreboard, Fibreboard is able to walk away from all asbestos-related claims without spending any of its own money other than insurance money, and the risk of there being a large number of claims in the future that are unanticipated today falls on the plaintiffs' class?

A. I think you've left something out.

Q. What have I left out?

A. What you've left out is that in the course of all this, Continental and Pacific will have paid an enormous process and eliminated the risk that there won't e any significant amount of money to pay a single one of these class members.

Q. Right. So that risk has been transferred through money over to the plaintiffs' class?

A. The plaintiffs have obtained an enormous

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1593-1594

plaintiffs' counsel, on August 27th, understood that the other side of the case, the defendants, Fibreboard and Continental, would not object to a fee up to three percent?

A. They understood that there was a source from which they could be paid a fee of up to three percent that did not involve the corpus of the settlement fund.

Q. All right. Now, the lawsuit in this case was filed on September the 9th, was it not?

A. That's correct.

Q. All right. Did you review the pleading that the plaintiffs' lawyers drafted before they filed them?

A. I saw those pleadings before they were filed.

Q. All right. Now, Mr. Koplow, was there ever an anticipation on the part of anyone, that you're aware of, to end up in a litigation class action in this case?

A. No, there was no contemplation of ending up in a litigation class action, although we recognized that it was not inconceivable that someone could make an effort to do that.

Q. Okay. And indeed in the ultimate settlement agreement there is a provision as to what happens if the settlement is not approved or is reversed in some way and the global falls through?

A. I don't recall that, Mr. Baron.

Q. Do you recall that provision that you pointed out to me in your deposition that takes parties back to their original position in the event that there is a global disapproval?

A. I don't believe that there is any provision in the agreement that specifically calls for the parties to dismiss the action. And frankly, were there, it wouldn't make any difference, because these plaintiffs and these counsel could turn around the next day and file precisely the same action against the very same parties, or even more parties if that's what -- if that's what they chose to do. So were there such a provision in the agreements, and I don't believe that there is, but were there such a provision, it wouldn't be worth very much. In addition to which, I think the record should also reflect that tone can't, on one's own, simply dismiss a class action. It requires the approval of the court.

Q. Okay. Would it be fair to say that before the lawsuit was filed in this case, all of the parties had an agreement on the amount of money that it would

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1601-1604

even in the case of a coverage case win.

Q. Okay. Did you ever estimate the cost to Continental of a coverage case win? By Fibreboard. Excuse me. If Fibreboard had won the coverage case, what would it have cost Continental?

A. I don't think I know the answer to that question.

Q. can you state it would have cost more than what's being paid under the trilateral?

A. I think if we didn't have an expectation that -- that the -- the cost of that would have been more, then we would have opted for another route.

Q. If Continental had not been able to reach a global settlement, a non-opt-out class action settlement with the plaintiffs, was Continental willing to do an arrangement with Fibreboard such as the trilateral agreement?

A. Mr. Baron, I think I -- I testified both at my deposition and at the last session of my testimony -- my appearance here, that an effort was made by Continental to try to reach a trilateral settlement agreement, but without success.

Q. Well, are you telling me that you don't think Fibreboard would have accepted the amount that they ultimately accepted in the trilateral but for the mandatory non-opt-out class, even though they believed that it was better to have a complete win in the insurance litigation?

A. I think Mr. Snyder is telling you that, looking back today, that the decisions that were made by Fibreboard in the fall of 1993, that those decisions resulted in significant benefit for Fibreboard over what they otherwise would have had. All I can tell you is that my experience in dealing with Fibreboard over the summer of 1993 was that it was impossible to achieve a trilateral settlement. We tried very hard. We would very much have liked to have done that. And then, when we finally got down to the short strokes with respect to a global, lo and behold, major obstacle was getting Fibreboard's agreement to the terms of a trilateral that didn't cost us appreciably more than a global. I mean, once we had that agreement, we spent two weeks fighting because Fibreboard felt that they still needed t have substantially more money than that. And then once we had an agreement with respect to that, it took us almost five weeks to get that agreement in writing because of all of the remaining concerns that they had. And that's -- that is what I am relying on. I'm delighted, however, looking back on it, Mr. Snyder feels that he got a good deal and approved Fibreboard's position.

Q. Which settlement is going to cost Fibreboard more, the global or the trilateral?

A. Looking at it today, it would be my guess that the global settlement will cost Continental.

Q. So as of today, would you prefer that Continental go forward only with the trilateral?

A. No.

Q. What are you getting for the extra money?

A. We're getting a -- a deal that sees the insurance company's dollars go out mostly to victims and not to lawyers and not to Brobeck, in particular.

[Laughter]

A. We're getting a deal -- I didn't mean to single Brobeck out, but the fact of the matter is that you're talking about taking $2 billion from insurance companies and spending hundreds of millions of dollars on law firm defense costs. And whether it's

Brobeck or it's Wacthtell Lipton or Debevoise, or anybody else who is in the defense business, the fact of the matter is that it is extremely bothersome to the insurance company to see the dollars going that way when there are still at the end of the day people saying, "We've been injured, we need to be compensated." That's No. 1.

No. 2 is that Continental believes, and believes very firmly, that if this global is approved that there will not be another knock on the door at CNA Plaza in Chicago, Illinois, at some point down the line seeking to disturb or upset the arrangement, and that there's a fair higher risk of that happening in connection with the trilateral settlement agreement.

Q. Okay.

A. And what we are buying here for enormous amount of money is total peace.

THE COURT: Mr. Baron, in East Texas, witnesses like Mr. Koplow have been designated as tar baby witnesses.

[Laughter]

THE COURT: The court has always had sympathy for lawyers who attempt to cross-examine tar baby witnesses.

[Laughter]

MR. BARON: I can use all the sympathy I can get.

[Laughter]

MR. BARON:

Q. Let's talk about -- so one of the reasons that

Testimony of Mever Koplow, counsel for Continental Casualty Co. Tr. 1614-1615

MR. KRISPIN: I stand corrected.

A. That's how I understood the question.

MR. KRISPIN: So the record is clear, I adopt that caveat.

Q. Those number in the neighborhood of some 50,000 or thereabouts

A. Which?
Q. Both present cases in Ahearn. Present unsettled cases.
A. The total of unsettled presents I think is somewhere in the range of %0,000 cases.
Q. All right. So right with those two -- those two factors, we have some 250,000 cases that would need to be necessarily dealt with under Continental's policy of insurance, at the outset?
A. No. We added 180 to 50, and I get 230, not 250.
Q. All right. 230. And multiplying that times 500,000 as a per person aggregate limit, clearly it's excess of $100 billion exposure. that is not to say that in fact that would in fact be the indemnity that Continental pays should those claims actually go to judgement and payment is sought?
A. Mr. Krispin, there are something like 200,000 present claims against Fibreboard with an aggregate cost of something under $2 billion. We can sit here all afternoon, I'm not going to agree with you that 180,000 future claims have a value that essentially is 50 times what the cases we've already settled, litigated, settled after verdict. It just - you can do the math if you want to do the math the way -- the way you're doing it, but I can't agree with you that the potential exposure under those circumstances is a hundred billion dollars. It isn't a hundred billion dollars. It's ignoring reality to say it's a hundred billion dollars.
Q. Well, my question does not ask you to value the cases. My question simply asks: What is the outside risk that Continental Insurance Company would experience under its policy -- general liability policy which is the subject of coverage litigation now pending in California. I think it begs the obvious that if you've got an aggregate per person limit of $500,000, you simply multiply that number times the number of claims that could conceivably come within the policy to arrive at what the outside limit is.
A. Well, first of all, I'm under oath. And I'm not, while under oath, going to agree that there's a risk that I don't believe under any conceivable set

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1637-1640

negotiation of the trilateral agreement.
A. That is correct.
Q. There was no one there at the table at any time from August 27, 1993 until December of 1993 that represented the interests of the class of future claimants, such as Mr. Coleman now is in the Rudd defense class action?

MR. WACHTELL: I think counsel meant October, when the trilateral was entered into, not December.

THE COURT: Whatever that date was.

A. The only participants in those negotiations, Mr. Krispin, were Pacific, the lawyers for Continental and the lawyers for Fibreboard.

MR. KRISPIN:

Q. Who determined that that class action, the Rudd class action I'm referring to, should be a non-opt-out mandatory class?
A. That's something that the insurers insisted upon.
Q. And the insurers, you mean Continental and Pacific?
A. Uh-huh.
Q. Did --
A. In any event, I'm having a difficult time understanding how we would settle the insurance coverage case with respect to some members of the class but not other members of the class. I can't imagine that that would have been an acceptable situation to Fibreboard. So I do need to amend my answer.
Q. Would you agree that the trilateral agreement in fact and in effect legally is a surrender of the policy for the sum that you have negotiated with Fibreboard?
A. I -- I think it wouldn't be -- it would not be unfair to so characterize it.
Q. Having agreed with me to that, are there any particular procedural difficulties that the insurers and Fibreboard considered at

the time of the negotiation of the trilateral with respect to affecting a surrendering of the policy?

A. Mr. Krispin, are you asking me to state for the record what areas of -- what legal issues were areas of concern for us in terms of getting the trilateral effected? Because if you are, I think I'd have to look to my counsel for direction as to whether he's comfortable with my giving you a detailed issues list or not. I would hope that he is not.

[Laughter]

Q. Having said that, would you look to your counsel?

MR. WACHTELL: Counsel was sitting quietly because counsel did not understand the question to be calling for that. If the question does call for that, counsel most definitely objects on the grounds of work-product privilege, Your Honor.

MR. KRISPIN: My response to that, Your Honor, is that it goes to -- the question asks for information that goes to the propriety, legal propriety and fairness of the trilateral agreement. And I think it's germane, and I don't see that there's any work-product privilege that can be asserted.

THE COURT: I sustain the objection and announce the afternoon break.

[Recess]

MR. KRISPIN:

Q. Prior to the break, Mr. Koplow, I asked you to disclose your work-product privileged information. I will not ask you to do that, particularly in light of the court sustaining your counsel's objection. But what I do want to know is, what was the reason behind the formation of a class action styled Rudd or Continental v. Rudd? What was the necessity of the class action?

A. Why did we do that?

Q. Yes.

A. We did it because if we were going to pay the billions of dollars that were involved, we wanted to know that we had a judgment that would be binding on people who may in the future seek to bring claims directly against the insurers if the fund ran out.

Q. What particular body of law was considered as being relevant to effecting a binding settlement on future class?

MR. WACHTELL: At this time, I don't need the witness to tell me I need to object, Your Honor. I object to work-product privilege.

THE COURT: I think you are treading on that, counsel.

MR. KRISPIN: Thank you.

Q. You are familiar with the Rudd complaint, are you not?

A. I was familiar with the Rudd complaint when it was -- when it was filed last June. I don't have -- I don't have all of the details of the complaint clearly in focus at the moment. But I'll do what I can to answer your questions.

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A. I have two -- two sets of opinions. One is that these lawyers should not have been negotiating this particular settlement for the so-called futures class at the same time as they were representing present clients in other matters. And the other is that there were conflicts of interest within the class such that there should have been lawyers to represent both sides of those conflicts involved in negotiating the settlement.

Q. All right. With respect to the first portion of your opinion regarding a conflict of interest between present claimants and future claimants at the time of the negotiations, can you tell me what factors you took into account in reaching that opinion?

A. Okay. I've taken into account a number of factors. First of all, this is a very large case, huge amounts of money involved, very large numbers of people involved, and a case very important, of course, for all those people. This is a case in which it's well worthwhile to have conflict-free representation. Now, also, there seems to be a real possibility in this case, substantial possibility as of the time the negotiations were going on, that there would not be

enough money to pay fully all of the -- the claimants that were likely to appear, including the present and the -- and the future. I base that on, on one hand, the great uncertainty as to how many and how large the claims were going to be; on the other hand, the uncertainty as to how much money was going to be available So that the result is that these two groups of claimants, the present and the future claimants, have interests that are in conflict as to gaining as large a proportion as possible of whatever sum of money or sums of money were ultimately going to be made available. And in addition, I consider that this is not a case in which one can rely on members of the class and the class representatives to protect the interests of the -- of the class members. The class representatives -- first of all, a lot of members of the class are, to a considerable extent, unidentified. These aren't people who know they have claims, who have already asserted claims, they are almost by definition people who have not yet asserted or settled claims, and therefore they can hardly be expected to take a very active role in maintaining and defending their own interests.

The class representatives would also have problems here. This is an extraordinarily complicated matter, you have to be very sophisticated and put in a lot of time to understand what the issues are. The class representatives, as far as I can tell from the depositions of the two of them that I have read, did not put in that time. In fact, most of the negotiations occurred before they even were designated as class representatives. And the negotiations were, as I understand it, substantially completed before they were told the resulting terms, so that their function was merely to come in at the end and approve what had already been done by other people. I see no indication that the conflicts were placed in front of them and they were told about them, that they were asked to provide any kind of informed consent.

Q. Any other factors that you took into account in rendering this first portion of your opinion?

A. Those are all the ones that occur to me at the present. Oh, no, I think that it seems to be there are alternatives available; that

is, it would be possible to provide representation that could not have these problems either by having the lawyers involved settle their cases, their present cases, before they got into the negotiations, as indeed the court at one time urged them to do, or, alternatively, to appoint lawyers who didn't have present cases pending to be all or some of the class representatives.

Q. Going back to one of the first bases that you have expressed for this portion of your opinion, you state that there is a possibility that the funds to be obtained might not have been enough to pay both groups of claimants; that is, the presents and the futures. Can you flesh out for the court what the basis for that belief is?

A. Okay. On the one hand, we have, as I stated, the uncertainty in the number and size of the claims. There have been attempts made to predict those claims. I gather that those attempts are -- are divergent. Attempts have been made in the past to predict asbestos claims which have not been all that successful. It's hard to know how many people will develop various kinds of diseases, especially the noncancer diseases; it's hard to predict how many of those people who do develop the diseases will assert claims; and, of course, it's hard to predict how the legal system in 30 years, say, is going to value those claims. So this isn't a question of anyone making a mistake, it's just an inherently difficult thing to do, I'd say an inherently impossible thing to do with any particular accuracy.

On the other hand, you have the amount of money available. Now, the only thing that, as the negotiations got underway, you knew for sure about the amount of money available is that Fibreboard had a certain amount of assets which were universally agreed to be insufficient to pay all the claims.

In addition to that, there was the possibility of getting money from the insurance companies. That depended upon one of two things: either Fibreboard winning ultimately in the California Supreme Court its coverage case or, alternatively, a settlement being reached. And, of course, it was impossible to predict

at the outset of the negotiations whether Fibreboard would win its coverage case or, if there was a settlement, how much money would be made available. So that you simply couldn't know what the funds would be, but you could know that it would be very far from infinite and that you would need a very large sum of money indeed to pay all the claims that might ultimately be expected to be asserted.

Q. And if the result of that possibility that there might not be enough money to pay both groups of claimants in full, would that mean that there was also a possibility that the two groups were competing for the same dollars?

A. I think it's more than a possibility. Once there's the possibility that the money will not be enough, a substantial possibility, then a responsible lawyer representing either of these groups has to reckon with that in his or her negotiations.

Q. At this point, Professor Leubsdorf, I'm going to read you a portion of the depostion testimony of Professor Hazard and ask you some questions regarding it. The deposition testimony at page 155, beginning at line 4, Professor Hazard states: I assume that anybody who confronts an obligation that doesn't have a boundary set on it by external events such as an in rem proceeding has a sense of his reserved price, that there would be an amount at which they would think the demands considered as a whole or considered separately wre not worth trying to settle for. So in a sense, you're asking a question, is two and two four? And the answer is: It usually is. That is, it is in the nature of the strategy of bargaining that a defendant will have a reserved price. It is also in the nature of bargaining that it is purely an analytic exercise to state in advance before the party makes a final decision what the reserve price is. Even in the case of somebody giving instructions to go to an auction, the person who is the agent making the bids can seek additional instruction if the circumstances warrant. So I think you are putting a question that is typically put in economic discussion but not by sophisticated economists on the

question of whether a reserve price preexists the decision to settle. I don't think it does.

Then skipping down to page 157 of the same testimony, Professor Hazard was asked the question: So the amount that was available here was not limited in any way?

Answer: Not by some external event, no.

Tell me, Professor Leubsdorf, do you agree with the statements by Professor Hazard that I just read from his deposition testimony?

A. I do. In fact, I would go a little further. I would say even if CNA, for example, had concealed within it some sort of definitive reserve price, there was no way in which the plaintiffs' lawyers knew that or knew what it was. So they had to proceed on the assumpion that it was not clear how
much money they were going to get.

Q. Does that change your opinion in any regard with respect to the conflict here between present and future clamants?

A. No. because my opinion isn't based on assuming that there was some definitive fixed amount, dollars and cents, that was the absolute limit, but simply that as the negotiations began and continued, there was a substantial possibility that CNA would not agree to put up or would not be required by the courts to put up enough money to pay all the claims. When I say CNA, I mean, of course, Pacific as well.

Q. Are you familiar generally with what has been referred to as the Ness Motley settlement that was negotiated in 1993?

A. I have looked at it.

Q. And you're aware that as part of that settlement, the present claimants who benefitted from it received contingent -- part of the payment that they were to receive was contingent on some future events occurring?

A. Right.

Q. What is the significance to your analysis of those contingent back-end payments to the present claimants of Ness Motley?

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class, but the conflict still existed. Their needs to the present clients were the sam immediatly after the appointment as they had been before the appointment. And indeed you have beginning before that but continuing after that even reminders of the interdependence of these two procedures that can be seen in correspondence and materials relating to the negotiations.

Q. What body of law do you rely upon in offering the opinion; that is, the first portion of your opinion regarding the conflict between present and future claimants?

A. Well, I'm relying basically on the law relating to conflicts of interest, which I consider to be relevant in a Rule 23 context because it's related to adequacy of representation. And the law relating to conflict of interest dervices from various sources. The two most obvious are, on the one hand, the rules that have been adopted in the various jurisdictions and, on the other hand, the common law or the precedential cases have been decided by courts usually in motions to disqualify but in other contexts as well.

Q. You referred to the rules that have been adopted by various jurisdictions. Is it fair to say that most of those jurisdictins have adopted some form of what's known as the Model Rules of Professional Conduct?

A. I believe that's now correct, yes.

Q. And do you believe provision 1.7(b) of the Model Rules of Professional Conduct is implicated in this case?

A. Yes.

Q. Could you read to the court the first portion of Rule 1.7(b)?

A. Let me find it. Okay. A lawyer shall not represent a client if the representation of that client may be materially limited by the layer's responsibilities to another client or to a third person or by

the lawyer's own intrests, unless -- and then you come to the expectations.

Q. Okay. What, in your opinion, do the words "may be materially limited" mean in the context of Rule 1.7(b)?

A. Well, in my view, they call upon whoever is approaching the issue to make a -- a judgment as to whether there is substantial likelihood of this kind of limitation likely. It's necessarily a matter o prediction. May be. Because this decision is to be made before accepting the representation. So you

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the beginning of the representation, when there weren't even any named plaintiffs as yet named. And there's at least the possibility that if the named plaintiffs refused to consent that the court could itself look at the situation and determine that the consent should be issued, as it were, for the class, with due regard to the fact, of course, that these are other people, that they're individuals who presumably know their own interests better than any court is likely to, and so it's not the same thing as someone consenting for himelf or herself, but, rather, a somewhat different situation.

Q. Assuming again that the laywers had proceeded under a reasonable belief that the representation would not be adversely affected, when in the context or this case do you believe the constructive consent, so to speak, that you have just described by the named plaintiffs and the court would have to have taken place in order to effectively waived the clause?

A. Well, what the rule contemplates, of course, is that it is to occur before the representation begins. There could be an enhanced stand of five minutes, an hour, or perhaps even longer than that, but I think the substantial point is that consent should occur before significant negotiations begin.

Q. Earlier you told the court that one of the factors that you have taken into account in identifying a conflict between the present and the future claimants is that there were practical alternatives available.

A. Right.

Q. Including appointment of other lawyers who did not have the present asbestos clients. Correct?

A. Yes.

Q. Now, what is the basis -- I take it that you believe other lawyers who did not have present asbestos cleints could be competent to provide adequate representation to the future claimants.

A. Yes.

Q. And what's the basis for that?

A. Okay. Well, obviously, it's a good thing for lawyers who are trying to settle this case to know a substantial amount, a great deal about asbestos litigation. And lawyers who already have that knowledge begin with that knowledge. On the other hand, the knowledge can to some extent be acquired. I think it's routine nowadays for firms, especially larger firms, I suppose, but also smaller firms, to get involved in new areas of law that they

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in -- in -- in settling this case.

Q. Now, from your reading of various materials that you have already described to the court, have you become generally familiar with the involvement of the law firm of Caplin & Drysdale in the negotiations for this case?

A. I have.

Q. And are you aware or have you become aware that the time that this was negotiated and continuing to today, the Caplin & Drysdale lawyers who were involved have not and have never represented individual asbestos claimants?

A. That is my understanding, though they had been involved in certain proceedings that involved asbestos.

A. Now, in your opinion, did their presence and involvement in the negotiations on behalf of the future class remove the conflict or the problem created by the conflict that you described?

A. No, I don't think it did.

Q. Why not?

A. Well, because they were not the lawyers representing the class. They were the lawyers representing or providing legal services to the lawyers representing the class. They were not authorized to make decisions as to what was going to be signed and what was going to be accepted, and certainly not to make them all by themselves. It was the lawyers who were, I suppose, first approached by Fibreboard and later designated by -- by the court who were the ones who were in charge. So that it was those lawyers who had to be free of conflict. And it doesn't do any good if they -- the lawyers who are in charge of a case have a conflict, that they have working for them a certain number of lawyers who are not subject to that same conflict.

THE COURT: Doctor, if the court's initial reaction to your testimony is the opinion that if inexperienced, competent plaintiffs counsel -- by inexperienced, I mean in the trenches of the asbestos cases -- had been designated by the court to negotiate for the future class in this case, it would have resulted in an economic benefit to the insurers of several hundred million dollars as compared to the number negotiated in this case. Whether that's true or not is not the question.

THE WITNESS: Sure.

THE COURT: Assuming that that's true, as that, in your judgment, simply a price one has to pay as a result of your view of the ethical considerations, and in the priority between those two you place the higher priority on ethical consierations, or is there also a concern that the courts have to deal with of equal importance, and that is adequacy of representation?

THE WITNESS: Adequacy of representation is certainly the issue. But I would say that even if the court were to reach the conclusion that Your Honor is describing, there's still the possibility of having the class represented by lawyers who do have asbestos experience but have settled their present cases, or perhaps by some combination so that you could bring both kinss of events to bear.

THE COURT: So the court, in your judgment, would have had the task of finding lawyers who had some familiarity with asbestos cases but had either gotten out of the business or didn't have enough of them to have any ongoing business?

THE WITNESS: I'm not sure I would say the court has the obligation. Normally when a class action is brought, the plaintiffs come into court and say, "This is the representation we propose." And the judge has to decide whether it's adequate or not. Now, some judges certainly have gotten involved actively, and I think that's perfectly proper, in finding --

THE COURT: Well, the chronology of this case was that the settlement facilitator made a recommendation that the time has now come where the process is best served by the appointment of counsel to represent the futures class.

THE WITNESS: Right.

THE COURT: So the court had to decide at that point who.

THE WITNESS: Right.

THE COURT: Or whom. I never can get those straight. And that places primary responsibility on the court at that point, does it not?

THE WITNESS: It places certainly the responsibility of deciding whether the proposed counsel are going to be adequate or not.

THE COURT: So if it comes down to balancing the interests of adequacy of counsel with the possibility of some ethical compromise because there's been dual-track negotiating, you

would say the ethical compromise should have precedence over adequacy of counsel?

THE WITNESS: No, I wouldn't put it that way. The adequacy of counsel is a prerequisite. The court can never -- should never certify a class action unless there's going to be adequate representation. And representation can be inadequate for several reasons, one of which is imcompetence, and another of which is a conflict of interest, and it seems to me that both of those requirements are required by Rule 23 to be satisfied before a class action is approved.

THE COURT: So then we come down to the question of prejudice, don't we?

THE WITNESS: Yeah.

THE COURT: And ultimately this question will resolve around whether the futures class members were better served or were prejudicated by the court's decision on appointment of counsel?

THE WITNESS: Yeah.

THE COURT: Fair statement?

THE WITNESS: Yes, It's a relevant issue.

MR. BAUGHMAN:

Q. Following up on the court's questions, Professor Leubsdorf, have you been asked in the context of rendering your opinion in this case to offer any opnion regarding the fairness of the

substantive terms?

A. No, I haven't.

Q. I'm going to ask you to assume for purposes of this question that the substantive terms of the settlement are in fact very fair to the class members. Assuming that, does that fact change any of your opinions?

A. If the conclusion is yes, that is a reasonable, fair settlement the court would ordinarily approve, assuming there were no conflict problems, no, that doesn't affect my result.

Q. Can you tell the court why not?

A. Well, because the plaintiff class is entitled not just to a settlement -- a result somewhat within the bounds of reasonableness, they're entitled to a settlement reached by properly-designated, by properly-representative and vigorous counsel. There are all sorts of possible results that could have been reached in a case like this. It's virtually impossible after the result to go back and say, "Well, if there had been conflict-free counsel, they would have done X dollars better." That's one reason why we have conflict rules, because of the fact that conflicts may influence behavior, but it's not too easy to figure out afterwards to what extend they have. So the only way to be sure that you have gotten what the class is entitled to, or virtually the only way, is to -- is to have proper counsel representing the class to begin with.

Q. Let's move on to the second portion of your opinion now, what I believe you described as conflicts amount the class members themselves. Can you describe for the court the first group of class members that you believe had conflicting interests?

A. Yes. This class contains two groups of claimants, among others, the so-called post-'59, 1959, claimants, and the pre-1959 claimants. Now, these were not - these groups had been, as it were, designated by the past history of asbestos litigation because the post-1959 claimants, as a result of the insurance situation, Fibreboard, were getting and were probably entitled to get much smaller amounts than those who were the pre-1959 claimants. Now, as you get to the situation of drafting a settlement, the interests of those two groups can come into conflict. The post-1959 claimant would not prefer to be treated on the same terms as the others, but if that's to be done, probably some concessions have to be made as far as treatment for the other claimants. So that someone has to pay for it and it's apparently

interests, quite large groups, I'm sure, in both cases.

A. And you can explain to the court why those two groups have conflicting interests?

A. Yes. The people who are not going to be injured for some time have an interest in making sure that the trust will be able to pay them when their injuries occur. And in order for that to occur, they have an interest in securing measures that will cut down the average size of payments in order to make sure that enough money is left for them. The settlement already has embodied some of these arrangements. There could have been more, I suppose, but there are already some of them. They're so-called spendthrift provisions of the trust. Provisions that there will be no prejudgment or post-judgment interest. There are provisions about damage caps, punitive damages.

On the other hand, the people who have already been injured and were going to present their claims within a rather short time, they would, of course, have an interest in -- in getting compensation that they would otherwise have expected to get in the court system, which would have included, for instance, prejudgment interest, some of the other type things I mentioned.

So that there is this conflict. It can be resolved in many different ways. There are various compromises that can be worked out. But in working out that compromise, the parties affected should be represented. That's why there should be separate lawyers representing each of those interests.

Q. I forgot to ask you, moving back to the second conflict within the class that you identified -- that is, conflict between those individual class members who might be represented by counsel who are a part of the SCB and those who are not -- how, in your opinion, should that conflict have been resolved?

A. Well, I think in this case there are any number of ways in which that conflict could have been removed. First of all, you

could, of course, have had negotiating counsel who had agreed in advance that they would not serve on the SCB.

Secondly, you could have agreed that you would not have all the clauses governing the SCB that I referred to; that is, you could have said that members of the SCB may not represent individual claimants, that that would be part of the -- put it in early in the negotiations that the lawyers who

Testimony of John Leubsdorf, legal ethics expert Tr. 1791

Q. Professor Luebsdorf, let me just take a few minutes about your own experiences. You testified at the deposition that up until this case and your being retained as an expert witness n this case, you had never testified before in any mass tort case; is that correct?

A. That's correct.

Q. And you had never testified, therefore, in any case involving asbestos; is that correct?

A. That's correct.

Q. And indeed you had never been consulted before being retained in this case in any matter involving mass torts or asbestos. Correct?

A. I'm not sure if that's true. I have written an amicus brief in an asbestos case. I don't know if you call that being consulted. And I've -- I think some of the services I provided in other contexts have in fact involved mass tort cases.

Q. Well, take the amicus brief for a moment.

A. Right.

Q. Are you referring to the Georgine matter in Pennsylvania?

A. That's correct.

Q. And you filed an amicus brief in that case, is that correct?

Testimony of John Leubsdorf, legal ethics expert Tr. 1793-1794

Q. At the time, I believe you testified a few weeks ago, Professor Luebsdorf, you indicated that you had formed your tentative opinions in this matter before you had read all the depositions; is that correct?

A. I had started to form tentative opinions before having read all the deposition of the -- I've read at least one or two depositions since I spoke at the deposition.

Q. But is the answer to my question correct that before you formed your tentative opinions or at the time you first formed your tentative opinions, you had not read all the depositions? I believe you specifically said you had not read Mr. Cox's and Mr. Rice's depositions.

A. No. I don't think that's what I recall saying. What I recall saying is that at that time I -- I did have -- you know, I did express opinions. Well, maybe it is. I'm not sure what you mean by tentative opinions or what I mean by tentative opinions. I started forming opinions before having read Mr. Cox's deposition on the basis of other documents and representations that were made as to what I would find when I looked at the matter. As time went on and I read more documents, I have become less tentative.

Q. In fact, you formed your tentative opinion, sir, I believe you testified, around the time of the meeting you had with Mr. Baron and Mr. Baughman on November 29th, in New York, which was before Mr. Cox and Mr. Rice had testified. Correct?

A. I think I had some tentative opinions at that time, though I couldn't recall exactly what I said to them at that time.

Q. Have you ever published any articles dealing with asbestos or mass torts?

A. No.

Q. Have you ever published any articles addressing the application of Rule 1.7, the ethics rule, in the context of class actions?

A. No.
Q. Have you ever been personally involved in negotiating to completion a class action settlement?
A. I would say not, except in the sense that I have negotiated agreements as to significant issues in the class action. But it was not a general settlement. It was far from a general settlement.
Q. And it wasn't to completion in the sense of having a completed settlement, is that correct?
A. Well, in the course of litigating a class

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that correct?
A. At that time I had more familiarity --
Q. At that time begin when you taught at Berkeley?
A. No. I mean when I gave my testimony before I had read through the Texas Rules, I had more familiarity with the California rules than the Texas Rules.
Q. Are you aware of what the California rule is with respect to settlements in the class action area?
A. No.
Q. You're not aware that the comment in consent class action in California is specifically stated under in the corollary to Rule 23?
A. No, I'm not. I'm not even sure if I'm aware of comments to the California rules in that matter.
Q. Are you aware, sir, of the local rule 3 of the Eastern District of Texas applicable to ethics rules?
A. No, I'm not.
Q. Now, you indicated in your testimony this morning that you know Professor Geoffrey Hazard by reputation and that you respect his work. Do you recall saying that?
A. Yes. By reputation and personally.

Q. Indeed, isn't it correct that you have no reservations whatsoever as to Professor Hazard's credentials as an expert in professional ethics and professional responsibility?
A. I have no doubt that he's qualified to testify as an expert.
Q. And you have no reservations at all in saying that, is that right?
A. None.
Q. Now, Ortiz exhibit 11 was handled to us this morning, and it is a list of the documents that you consulted. Do you have a copy of that, sir?
A. No, I don't.
MR. BSCHORR: Do we have another copy?
MR. BAUGHMAN: I think the only other copy, Mr. Bschorr--
MR. BSCHORR: Could we have the court's copy given to the witness, please, with Your Honor's permission?
THE COURT: Certainly.
MR. BSCHORR: Ortiz 11.
MR. RICE: Was it an exhibit to the deposition?
MR. BSCHORR: No.
Q. I hand that to you, sir.
A. Thank you.
Q. Does Ortiz exhibit 11 comprise a complete list

Testimony of John Leubsdorf, legal ethics expert Tr. 1805

approving settlement?
A. I don't recognize it, no.
Q. Is it your opinion that all members of the class must be identical interests --
A. No.
Q. -- or they need separate representation?
A. No. That's impossible.
Q. You recognize that there can be differences, I take it.

A. Yes.
Q. When Mr. Baughman inquired before of the basis of your opinion, at one point you and he were discussing 1.7(b)--
A. Right.
Q. -- of the model rules. Do you recall that?
A. Yes.
Q. Am I correct that it's your opinion that 1.7(a) is not applicable to this situation?
A. In my opinion, it's not.
Q. So what we're dealing with here is 1.7(b), is that correct?
A. And to the some extent 1.8(g) has some relevance.
Q. That's the aggregate settlement issue?
A. Right.

Testimony of John Leubsdorf, legal ethics expert Tr. 1807

witness?

MR. BSCHORR: I'm about to, Your Honor.

THE COURT: Any objection to Pacific 1? Admitted.

MR. BSCHORR:

Q. Now, Mr. Leubsdorf, that's draft No. 4 of the restatement of law governing lawyers, is it not?
A. Tentative draft No. 4, yes.
Q. Tentative draft. Okay. If you look at the second page, section 201 --
A. Right.
Q. The basic rule, prohibition of conflict of interest, do you see that?
A. Yes.
Q. Do you see where it says, in the second sentence, in the bold, a conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or the lawyer's

duties to another current client, former client or third person? Do you see that?
A. Yeah.
Q. And as I understand your opinion, it is your opinion that this conflict exists because of the

Testimony of John Leubsdorf, legal ethics expert Tr. 1808-1810

relationship between the lawyer's representation of the client and the lawyer's representation of another client, i.e., the present and future situation. Is that correct?
A. That's correct, yes.
Q. Nothing else under this rule or Rule 1.7 is affected by your opinion, is it, or implicated? Other than the relationship between the presents and futures that you discussed.
A. Well, I suppose the second group of conflicts I discussed would also fall under this provision, because a general provision -- there are more specific provisions later on in this chapter.
Q. Now, substantial risk. What is your understanding of those words?
A. Well, I would say they speak for themselves pretty well. It means that it has to be more than just a possibility or a faint risk or a slight risk, it has to be -- there has to be a balancing process that goes on as to the extent of the risk and the extent of the harm.
Q. Has to be a significant and plausible risk, even if not probable? Do you agree with that?
A. That's okay, sure.
Q. Would you agree it requires a greater showing, ...then, that the effects may occur or the mere possibility that they occur?
A. A greater showing than what? You mean there has to be a greater showing than the mere possibility?
Q. Yes.

A. Well, I don't know. It depends what you mean by "mere," I suppose. You could never go beyond showing a possibility, because you can't -- you don't wait until the events actually -- the consequence actually can be proved. You're always dealing with possibilities. But the question is the extent of the possibility. And substantial is as good a word as anything. A substantial possibility, not just a mere possibility.

Q. So it needs to be a more than a mere possibility, in your opinion?

A. Yeah.

Q. Now, the word "materiality" appears in 201. Do you see that?

A. Yes.

Q. Must be materially and adversely affected.

A. Right

Q. What is your understanding of the word "material"?

A. Well, it means that the effect would not only be adverse but adverse -- but have a certain size, a certain -- certain extent. In other words, a client might be adversely influenced by settlement being put off for five minutes. That is adverse, but it's not material. But if you deal with a possibility that the client will get, say, a sizable percent less money, that would fall very clearly on the other side of the line, that's both adverse and material.

Q. Let me ask you a little bit about your understanding of these negotiations. We've talked about the words, and I know during the deposition in New York we talked about the concept of a global settlement. I believe you testified at that time that you believed that this conflict between the presents and futures began in 1991, when you said global discussions began. Do you recall that testimony?

A. Yes.

Q. Is that still your view here today?

A. Yes.

Q. So your view is that this conflict lasted for about three years?

A. From sometime in 1991 to sometime in 1993, when the agreements were signed.

Testimony of John Leubsdorf, legal ethics expert Tr. 1817

Q. It's a treatise that is used in our profession, is it not?

A. It is, yes. And by the Supreme Court, I believe.

Q. The definition of collusion, as appears in Black's, and let me read, an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. Do you agree with that definition, sir?

A. That's certainly one way in which the word is used, yes.

Q. In your review of the records here, do you see anything in these negotiations that were collusive, as that word was just defined?

A. I wouldn't say so.

Q. In fact, you agree there was none; is that right?

A. I said I didn't see anything. I can't really say what was or wasn't. I assume that if there had been collusion, it would not be written out in a document.

Q. Let me talk a little bit about your views of what has been sometimes called a settlement class action. Do you have an understanding of those words?

A. Yes.

Testimony of John Leubsdorf, legal ethics expert Tr. 1826-1827

on the payment of a global settlement, like Ness Motley.

Q. You are aware, are you not, sir, indeed I believe you acknowledged at your deposition in New York, that these four class counsel are all expert experienced counsel in asbestos?

A. Yes.

Q. You have no limitations on that, do you?
A. Not the slightest reason to doubt it.
Q. Indeed, you are aware that Fibreboard viewed and the record in this fairness hearing so indicates that Fibreboard viewed these four counsel as their principal adversaries in the asbestos litigation business?
A. I don't recall seeing that particular statement, but I have seen what they regarded --
Q. I take it the reason you don't remember is because you didn't read yesterday's transcript.
A. That's probably why.
Q. And you are aware, I take it, that Mr. Kazan himself has a practice that I think in his words in his deposition and certainly in the courtroom were focused on mesothelioma patients, claimants who had suffered the highest, most severe form of an asbestos-related disease?
A. Yes.
A. And you are aware that Mr. Kazan and Mr. Wartnick were viewed not only by Fibreboard but by other counsel in the asbestos -- other plaintiffs counsel as being experts in dealing with Fibreboard, having had many cases, many skirmishes, many battles with Fibreboard?
A. Yes.
Q. And you are also aware that Mr. Cox and Mr. Rice are from the firm of Ness Motley, which has a national practice involving asbestos claimants? You're aware of that?
A. Yes.
Q. For many years they've been assumed to be one of the foremost counsel in the asbestos business?
A. Yes.
Q. Do you agree that the courts, in considering the issues that you presented your opinions on, should take a practical approach in resolving them?
A. Yes.

Q. And you agree that practicalities always count even in ethical matters?
A. Yes.
Q. Let me ask you a couple of questions concerning the opinion between presents and futures that you

Testimony of John Leubsdorf, legal ethics expert Tr. 1876-1877

Q. I believe you testified at your deposition that you were unaware of any significant negotiations by class counsel between August 27th and October 12th, while this trilateral was being negotiated between the insurers and Fibreboard. Do you recall that?
A. I'm not sure if I said that or not.
Q. We'll come to that in a minute.
Do you also recall that on October 13th, in your words, the conflict between the presents and the futures had been substantially reduced, perhaps eliminated by that point?
A. I don't remember if I -- I said that, but it seems a plausible statement in view of the signing of the trilateral.
Q. Let me refer you, sir, to the answer you gave at page 478, line 11, which is in the middle of your answer. I'll read the whole part, if anybody wants me to, but I'm only interested in the last sentence.
In the case of Ness Motley, I have seen that, and I would say the conflict had certainly been very substantially reduced, perhaps eliminated, by that date.
The record will reflect we're talking about October 12th.
A. Okay.
Q. Okay?
A. Yeah.
Q. Now, I take it any negotiations thereafter with respect to the terms of what ultimately became the global settlement which

was signed on December 23rd are not affected, in your view, by the present/future conflict you've been discussing.

A. Well, you would still have one part remaining; that is, that these lawyers would still have an interest in the implementation of the Ness Motley agreement for their clients. But that is certainly a lesser conflict than the one we've been discussing. And if that had been all there were in this case, I don't know that, you know, I would be reaching the conclusion I did.

Q. Right. Indeed, the issues of both would have the same interests in this proceeding, wouldn't they?

A. I'm not sure that the Ness Motley claimants would care very much one way or the other once there was a trilateral, because that would trigger their recovery of the second 50 percent, if I recall correctly.

Q. Because the trilateral required court approval which hadn't been obtained yet.

A. Okay. They would have an interest in court

Testimony of John Leubsdorf, legal ethics expert Tr. 1891-1994

Q. Very well, I apologize.

A. As between those two groups, they have different interests.

Q. And why is that?

A. Because the -- those who are post-'59 would like to get compensated not at the level which has historically been available but at a level which is comparable to the terms available to pre'59 claimants. Pre-'59 claimants, on the other hand, to the extent that the fund may be inadequate, want to make sure that more money is going to be available to pay people in their group. And therefore they would tend to support the position that the post-'59 claimants should not get identical benefits to theirs.

Q. Do you have any understanding of how this pre '59, post '59 dichotomy came about?

A. Yes.

Q. What is your understanding?

A. My understanding is that the insurance coverage of Fibreboard is, of course, disputed to begin with, was, however, very severely limited even in the most optimistic assessment as to the post-'59, so that there was no reasonable likelihood that the funds available to Fibreboard from insurance and its own assets would be enough to pay those people, whereas the case of the pre-'59 claimants, if Fibreboard got enough money from the insurance company, it would then be able to pay them the full amount that they might expect to recover in the tort system.

Q. And is it your understanding that that situation that you just described continued all the way through the negotiations?

A. At some point it became clear that at least some money would be available to pay post-'59 claims from the insurance companies, but I don't remember the exact date on which that occurred.

Q. Did you ever read the Pacific/Fibreboard agreement of March 1992?

A. No, I did not.

Q. It's not on your list.

A. No, I didn't.

Q. Did you ever read the April 9th, 1993, agreement between CNA and Fibreboard?

A. No.

Q. So you don't know whether or not those two documents have any relevance to this issue, is that right?

A. That' absolutely true.

Q. And if I told you that those documents ...equalized, if you will, the playing field and made it clear that both pre- and post-59 claimants were going to be treated the same, would that change your opinion?

A. I'm not sure. I would have to think about it a little bit more, because I would want to know the terms on which they were all being made the same. That is, suppose we imagine an agreement which says "Okay, we're making a billion dollars available and it can be used to pay both pre- and post-'59 claims, but still it's only a billion dollars." At this point, there still might be a conflict between the pre- and post-'59 claimants. The pre-'59 claimants might come to Fibreboard and say, "Okay, now you have the money, but it's not enough for all of us. And the traditional pattern of settlements has been that we got more because insurance coverage was doubtful, and we still should get more." It's possible they would say that. Maybe they wouldn't. Maybe they would say, "Okay. Let's treat everyone equally."

Q. You're not familiar with the terms in the 1993 CNA-Fibreboard agreement which provides that any global settlement will be done entirely within the proceeds from insurance without distinction whatsoever between pre-'59 and post-'59?

A. No. and I -- I -- if it's as you describe it, it means that as of that date there still was no insurance money available from CNA to pay the post -'59 claims, only that there might be if a global settlement were agreed on. I still have the question what the terms of that global settlement should agree on. And as to those terms you could still have a disagreement.

Q. On November 12th, 1993, when the trilateral was entered into, there now was money available. Right?

A. Right.

Q. You have read that document, haven't you?

A. I'm not sure I have, actually.

Q. Oh, you haven't even read that one?

A. I think I read parts of it and I read a description of it.

Q. Well, are you aware in that document, the trilateral, that there is no distinction between pre- and post-'59 and the use of the money that is committed under that agreement?

A. I was unable to find anywhere in the documents a statement that there was to be a distinction. But I also had trouble finding there was not to be a distinction, not in the settlement agreement itself or in the trust agreement itself

Testimony of John Leubsdorf, legal ethics expert Tr. 1895

but in the notice of settlement. But it might be considered to be ambiguous. As I say, I didn't find any such agreement in the settlement agreement or the trust or the -- the -- the documents that came along with the trust.

Q. Okay.

A. I -- I -- I didn't look for it in the trilateral agreement. I'm not sure what effect it would have in the trilateral agreement proceeding under the trust. I assume it would be governed by the trust document but not by the trilateral.

Q. Let's talk a little bit about the SCB for a minute, which is the second part of your opinion, second half of your opinion.

A. Right.

Q. This is not a subclass issue either, is it, in your view?

A. I haven't advanced it in those terms, no.

Q. You advanced it in the terms of something that is unfair for claimants who might go to one of the four class counsel getting an advantage over others who do not go to those counsel?

A. And therefore a conflict resulting between those two groups of people, yes.

Q. Those two groups of people who sitting here

Testimony of John Leubsdorf, legal ethics expert Tr. 1909-1911

A. Well, there are several options. First of all, if the defendants -- that is, Fibreboard -- was really anxious to negotiate a

settlement of this sort, they would make it their business to make sure that the plaintiffs' lawyers were offered settlements that they could accept on behalf of their clients.

[Laughter]

A. If that were not to be done, you would have two possibilities:

One is that you would proceed with counsel, as I've said before, who did not have prior litigation experience.

Or the other is that you would not have those kinds of settlements.

Now perhaps you might say, you know, you imagine that there is absolutely nowhere in the world any lawyer to be found who is free of conflict and able to undertake settlement negotiations, and that such lawyers cannot be produced by settlement negotiations on the present claims. Well, I don't know what I would say then. But I have no reason to doubt that you could find competent and conflict-free lawyers by one of the several methods that I have suggested.

Q. Now, you talked about the fact that there ought to be counsel representing different interests within the class, is that right?

A. Yes.

Q. But you don't characterize those different interests as subclasses?

A. I -- you can characterize them as subclasses or not. But speaking of subclassing suggests that the class is to be divided up into watertight entities, each of which is to be separate and is to have its own representation. That is one thing the courts have sometimes done. I don't think it's necessary to be done here. You might disagree and say there should be subclassing and therefore there should be eight lawyers or eight sets of lawyers. I don't think it's necessary, but, as I said, it could be done, that is one approach the courts have sometimes used.

Q. If you don't have subclasses, how are you going to define the roles of each of the lawyers?

A. By saying to the lawyer: "You, Mr. or Ms. A, are to represent the interests of the post-1959 claimants in getting the best possible benefits; and, you, B, are to represent the interests of the pre-'59 claimants; and you, C, are to represent the interests of those people in the class who have already suffered legally cognizable harm; and you, D, are to represent the interests of those who are not; and furthermore, of you, A, B, C and D, B and D are to agree in advance that you will not serve on the SCB. That's one way you can do it. But obviously there are different ways.

Q. If you had a post-'59 person who had a legally cognizable injury and another post-'59 who didn't have one, would those two folks require separate counsel to represent their varying interests?

A. They would have separate counsel to represent that particular varying interest in forms of lawyers C and D.

THE COURT: Counsel, we've approached the time that I have a better deal.

MR. KAPLAN: Okay.

THE COURT: And we will resume at 1:00.

[Lunch recess]

MR. KAPLAN: May I proceed, Your Honor?

THE COURT: Yes, sir.

Q. Professor Leubsdorf, before lunch we were talking about the fact that Justice Higginbotham had

present clients outside the settlement?

Q. Yes.

A. Well, that would certainly remove the first problem that I was concerned about. It wouldn't deal with the other conflicts within the class, of course, but it would --

Q. As you've alluded to before, you're aware of the fact that the reason that the futures deal was negotiated separately as a futures deal was at the suggestion of Judge Higginbotham. Correct?

A. I remember that he did suggest that, yes.

Q. And you believe that he was wrong in making that suggestion?

A. It seems as if it was a good suggestion from the point of view of reaching an agreement. Whether the problems of conflict of interest were before him at that time and what he thought about them is another question. The only thing I know about what he thought about the conflict is that he is reported as having expressed some concern at one point about this situation.

Q. So Judge Higginbotham --

A. Whether that was the first kind of conflict, whether anyone pointed out to him the problems, the other kinds of problems that I have discussed, I ... don't really know. It seems to me that the avoidance of conflict is in the first instance something that lawyers are supposed to do, and you can't go around saying: Well, the judge never told me to do any differently, so it must be okay.

Q. Well, Judge Higginbotham had been advised of the fact that there were potential conflicts. Correct?

A. He had been advised as to the first class of conflict that I mentioned between the futures and the present class.

Q. Notwithstanding, he nevertheless recommended that a futures deal only be pursued. Correct?

A. I gather he did, yes.

Q. Does that in any way alter your opinion that what these counsel did here was ethical?

A. No, not unless I find that situations were presented to him and he was asked to reach a decision about them.

Q. You have no information as to whether the Ness Motley deal was any better or worse than the global deal that's before the court here, do you?

A. I have some information, but I don't purport to be qualified to form an opinion on it.

Q. Okay. And you're also aware of the fact that ... the risk of the coverage cases that were pending in California was a very important consideration for setting counsel, was it not?

A. Yes.

Q. I see. And was it also important that that counsel try to resolve a global settlement prior to the final resolution of the coverage cases in California?

A. There was some concern that there be a commitment by the insurance companies to pay in substantial sums of money rather than wait and see what the results of the coverage cases would be.

Q. Right. As part of a global settlement?

A. As part of a global settlement or otherwise.

Q. Right. And you're aware of Justice Kaufman's opinion that there was a significant risk that Fibreboard might lose the coverage cases?

A. I haven't read his opinions, but I've read that that was his opinion.

Q. Do you think adding more counsel to the plaintiffs' negotiating team would have facilitated a quicker resolution of the global settlement in light of the tendency of the coverage cases in California?

A. I don't know.

Q. Do you have any reason to believe that it would have hastened the resolution of the settlement?

A. I have no reason to believe one way or the other. I can see, you know, it might have helped, it might have hurt.

Q. How could it have helped?

A. Well, sometimes if you add another person, that person comes up with a helpful idea. Sometimes if you add another person that just means another person goes along with everyone else.

Q. So if you have one representing pre-'59s and one representing post-'59s and they're arguing with each other, do you think that's going to make the settlement negotiations go quicker?

A. Not in themselves, no.

Q. And you think that somebody representing presently injured people and somebody representing people who aren't injured, they're talking about how that should be divided up, that's going to make the settlement negotiations go quicker?

A. Not necessarily, no.

Q. And do you think the people representing more seriously injured people and those representing less seriously injured people, if they're fighting about who should get what portion of the pie, that's going to make the settlement talks move along more quickly?.....

A. Not in and of itself, no.

Q. Weren't they under pressure to get these settlements done before the California court ruled on the coverage case?

A. Yes, they were.

Q. You suggested before if somebody settled their present cases on all-cash basis that counsel could go forward and negotiate a futures deal?

A. I believe so, yes.

Q. Are you aware of any plaintiffs' asbestos lawyer that settled with Fibreboard on all-cash basis at any time after 1991?

A. I haven't heard of that, no.

Q. So who would Fibreboard and the insurers have been negotiating with to consummate a global deal?

A. Well, it was Fibreboard that wanted to have a global deal, and so I think it's quite possible that if Fibreboard had realized this was a problem that they would have arranged a settlement with some of those lawyers.

Q. So they could have paid cash to one lawyer to settle a case and pay all the other settlements and assignments and use their one counsel that they paid cash for to negotiate a global deal? Is that what you're suggesting?

MR. BAUGHMAN: Objection, Your Honor. This has been fully explored by Mr. Bschorr, I believe.

MR. KAPLAN: I don't believe it has, Your Honor.

THE COURT: Overruled.

A. I think they could have done that, yes.

MR. KAPLAN:

Q. How would the select that particular counsel they're gong to favor by giving cash to when they're not giving cash to anyone else?

A. I suppose the same way they selected the counsel they did decide to negotiate with. They suggested Mr. Kazan, Mr. Wartnick and the two lawyers from Ness Motley on some consideration, some of which have been mentioned today; and they could have used the same grounds for selecting them.

Q. You don't think that paying cash to one lawyer in order to be able to negotiate a futures deal would have created some appearance of impropriety?

A. Well, some people might have objected to it; but the point is that once the money has been paid, remember, the lawyer is not simply getting cash, the clients are not simply getting cash, the lawyer is giving up the prospect of representing other present clients for a period of some years into the future. And once the money has actually been paid, there's no continuing existence of any conflict. Some people might think this was a bad thing to do. Some people would think that having a settlement class action is also a bad thing to do. Whatever you do in dealing with asbestos litigation, someone will think that it's being done wrong. That's not the question I've been brought in to testify about. It's what was professionally proper.

Q. Let's talk for a moment about the subject you just mentioned, which was giving up your cases while you're negotiating this futures deal. As I understand it, in your view, the person negotiating this futures deal would have had to settle their present cases. Correct?

A. Right.

Q. And not take on any new cases. Correct?

A. Right.

Q. And for what period of time would that person have to do that in order to be ethically able to negotiate this futures deal?

A. For as long as they wanted to participate.

Q. I see. So in this case I think there's some testimony that some negotiations began in 1991.

A. Right.

Q. And they weren't consummated until 1993. Correct?

A. Yeah.

Q. So for two years somebody would have to give up their asbestos cases in order to negotiate this futures deal? Is that what you're suggesting?

A. That was one of the possibilities. And the other, of course, was selecting someone with other kinds of expertise other than asbestos trial expertise.

Q. But if all things considered somebody that had asbestos expertise would be the person that would be most proper to negotiate on behalf of asbestos victims, wouldn't it be implausible for that person to give up his or her practice for two years in order to negotiate a futures deal?

A. Well, I don't know. I never tried it. I know there's substantial fee possible as a result of this deal for at least some lawyers, and that there's a possibility of work in the future, and that some lawyers don't do only asbestos cases, they do a mix of cases, including some asbestos and some other cases. So, of course, a lawyer wouldn't have to give up the other cases. And for that matter, if he wanted to be technical, just the asbestos cases against Fibreboard, though I realize that doesn't make an enormous practical difference.

Q. Some guy who walks in their office with a claim against Fibreboard and other manufacturers, they would have to get another lawyer to represent them against the other manufacturers. Correct?

A. Yes.

Q. So they would have two sets of lawyers working on the same cases. Right?

A. No, they wouldn't. That wouldn't be a sensible way to handle it. Someone who had a claim against both Fibreboard and

other manufacturers, the sensible think would be for the lawyer we're dealing with not to accept that case. I was raising the possibility that someone might have a claim that was not against Fibreboard at all, but just against other companies. I realize that most asbestos claims are likely to be against a number of companies.

Q. So in that situation class counsel would have to refrain from representing the plaintiff against Fibreboard, and that plaintiff would have to get other counsel to represent him against Fibreboard. Correct?

A. And the other defendants, yes. He wouldn't hire this counsel, he would hire someone else, who would then represent him against all of the defendants he was suing. Fibreboard and the rest.

Q. I see. So these class counsel then couldn't represent any asbestos plaintiffs then, is that right, since Fibreboard is implicated in most of the cases?

A. In any case in which Fibreboard is a defendant.

Q. Which is most of the cases. Right?

A. Right.

Q. Now let's talk about subclasses for a second. You were trying to draw some line between people that were presently injured and people that might be injured in the future. I believe you testified in our deposition that you couldn't pick a specific time as to when that distinction ought to be made. Is that right? In fact, I think you used the word "arbitrary."

A. Yeah.

Q. What date would you choose to decide the cutoff point between the different representations?

A. I wouldn't feel that that's necessary. As I said before, I'm not proposing at this point a subclass in the sense of a formal delineation by the court of two disjunct groups of people. I'm proposing lawyers to represent two interests, present cognizable injury and those who will not be injured until somewhere in the future. Where you choose to draw the line between those is a de-

cision that simply doesn't have to be made. There are these groups of people which are easy to identify in the extreme, although like most groups they shade into each other. It's often difficult to tell whether one individual is or is not in a class. But that doesn't prevent you from having class action. In this case, you don't have classes, you just have lawyers who are representing interests.

Q. The reason you think there should be that distinction between people that are presently injured and those that aren't yet injured is because the people that aren't injured might not get paid? Is that right?

A. Yeah.

Q. So you would have to determine when in time in the future that eventuality might happen. Right?

A. No. You would do what I just said. You're just repeating your previous point. And the answer I gave to it before applies to this version, too. They're not drawing a line. Don't have to draw a line. Just have to appoint two lawyers and tell one of the lawyers, "You should speak up for those people who have presently existing claims and want to get things like prejudgment interest"; tell someone else, "You should speak up for those people, whoever they might ultimately turn out to be, who won't be having claims that accrue for some time yet and who therefore would prefer to sacrifice the prejudgment interest in order to get paid anything at all."

Q. So this particular lawyer wouldn't know who his clients were, is that correct?

A. He would know his clients were the members of the class, he would know some of the people whose interests he were protecting; in other cases, he wouldn't.

Q. I see. Now, one of the things that you pointed out in your written opinion that you didn't mention today was that you would make some distinction between people that are more sick and those that are less sick, and you would have separate lawyers representing those separate folks?

A. Right.

Q. And you would bring in how many different lawyers to represent those different groups of people?

A. That was something I said in my opinion. I didn't say it today. But when I did say it, I was thinking that you would need to bring in two more lawyers for that purpose as well.

Q. Since you didn't mention it today, have you withdrawn that as a basis of objection?

A. I've decided that although there are definitely problems raised here, it's not as clear a case to me as the others; and therefore, I spoke to counsel, and they decided they were not going to ask me to present my views on that particular issue.

Q. Okay. Let me ask you a couple of more questions, and I'll be done with you.

Assuming that class counsel used their representation of their present claimants to somehow leverage up the amount of money that they were going to be able to get for the futures class, would that change your opinion as to the propriety of their conduct?

A. Well, if I were convinced that that had occurred, that would certainly be a relevant fact. I would want to know more details.

Q. How relevant would it be?

A. Well, the danger, I'm concerned about two sets of dangers. I take it you're addressing yourself to the futures present conflict, the first one I discussed.

Q. Yes, I am.

A. And the danger there is, of course, that their duties to present clients will lead these lawyers not to represent their -- their future class as vigorously as they might otherwise. What you're saying is: Imaging that for some reason their representation of the present class is used by them to improve their representation of the futures class.

Q. Yes.

A. Well, if it could be shown that that had happened, that would certainly indicate that the problem had not materialized. The problem is, as I said before, you have to compare things to the hypothetical situation in which the futures are represented by conflict-free lawyers. And that's very hard to do.

Q. At the onset of negotiations, how would class counsel be able to identify all the various interests which would require separate counsel?

A. Well, that's -- they would have to item them as they became identifiable. Since these were lawyers with great experience in asbestos litigation, as you

Testimony of John Leubsdorf, legal ethics expert Tr. 1939-1941

problem wouldn't arise looking forward would be to use your previous testimony for Fibreboard to have paid cash for something. Right?

A. Or alternatively to use the lawyers without asbestos litigating --

Q. I'd like to address that. You understand that on the basis of this record the court may find that Fibreboard paid no cash during the period of 1991 -- all cash to settle their cases. Correct?

A. Yeah.

Q. Therefore, if the court were to find that, then the lawyers that Fibreboard agreed to pay cash to would be getting special, beneficial treatment, right, better than everybody else in the country?

A. Right.

Q. And --

A. I don't think the equal protection clause applies to Fibreboard, as far as I know.

Q. Well --

A. They're allowed to settle with some people and not with others.

Q. Do you think settlement negotiations have to be described in a class notice?

A. Yes.

Q. Do you think they would have to describe in a class notice that Fibrebroad had selected some lawyer and agreed to pay out all his cases for cash so that he could agree to be a futures negotiator would have to be described in the notice?

A. The part about selecting the lawyers is described in the notice anyway, and if there are conflicts they should be described. And if those conflicts have been removed, they should also be described.

Q. That means the answer to my question is yes?

A. Yes, the answer is yes if you should describe all the relevant facts in the notice.

Q. What do you think the reaction of the plaintiffs' bar would be to the appearance where the futures class counsel was the only plaintiffs' counsel in the country that had gotten all cash for its cases as a quid pro quo for agreeing to negotiate a futures deal?

A. Well, first of all, no doubt some members of the plaintiffs' bar would be upset, other members would notice that while they had gotten cash and while their clients had gotten cash, these lawyers had had to agree in response to stay out of the asbestos litigation area for a number of years, which might be a substantial hardship on them and might countervail the previous --

Q. Now --

A. And -- and ultimately, you know, the question is not what -- what the plaintiffs' bar will like, the question is what is fair to the claimants and what is consistent with the requirement of Rule 23. It may be that the plaintiffs' bar would be very discontented. They would probably be discontented with any class action settlement at some point, because it prevents them from bringing separate suits unless it's carefully written to preserve those rights.

And that's always open to question. But the question isn't what the plaintiffs' bar likes.

Q. Do you know how many objections have been filed by plaintiffs' lawyers in this case, Professor Leubsdorf?

A. Few, I understand. At least people actually proceeding with objections.

Q. Isn't it true that something a court is asked to take into account in approving a settlement under Rule 23 is the extent of objections?

MR. BAUGHMAN: Objection.

A. Objections from the class members, not objections from lawyers who feel that they haven't gotten --

Testimony of John Leubsdorf, legal ethics expert Tr. 1944-1945

I am in all this. I understand your point. It's already, I think, been made, the court's quite prepared to judge the credibility of the testimony of this witness. I would suggest that we are getting a bit cumulative. And some of the points you're making can be addressed at argument time, because they are argumentative.

[LAUGHTER]

THE COURT: And if we have something new with this witness, lets's -- let's get to that; otherwise, let's move to Professor Sherman.

MR. LOCKWOOD:

Q. Professor Leubsdorf, if this plaintiffs counsel that took all cash had agreed with Fibreboard as part of that settlement that they wouldn't take on any more present cases so they could negotiate a futures deal --

A. Right.

Q. -- wouldn't that violate the canon on agreements to restrict practice?

A. Well, I don't know that they would have to agree to do it. They could simply represent that they had no plans to do so. If they changed their mind, they would have to withdraw from the negotiation.

Q. So Fibreboard could kind of have a series of plaintiffs' counsel they pay cash, they withdraw from the deal, they pay cash to another guy, withdraw from the deal --

A. No, I don't think that would follow. I think lawyers would usually stick to that representation if they were the kind of people you wanted to negotiate with in the first place. Also, it's not clear to me that the agreement you're describing would be a violation of that provision. That purpose is to provide -- the purpose of that provision is to prevent defendants from, as it were, buying plaintiffs' lawyers out of the representation area simply in order to avoid being sued by them. In this case, the purpose of the agreement is to secure conflict-free representation, itself a goal, important goal, under the model rules and under all systems of legal ethics. And to agree that you would avoid a conflict of interest is I think rather different from saying, "Okay, I'll settle this case for you and I'll give you the further bonus of saying that I never again will sue Fibreboard in an asbestos case." The second is clearly wrong. The first serves some legitimate purpose, and I know of no particular authority on the issue, but I think it

Testimony of John Leubsdorf, legal ethics expert Tr. 1948

A. But whether that means he reached any conclusion one way or the other about Rule 1.7, or Judge Higginbotham had either, I think judges reach decisions when matters are placed before them. I don't think one should go around assuming judges will take the responsibility for ethical issues sub silentio.

Q. You testified -- assuming for the sake of discussion -- well, let me back up. You have no personal knowledge of where one would find a lawyer experienced in asbestos cases that would

be willing to go out of the business for two or three years to negotiate a futures class. Isn't that true?

A. I have no particular names in mind, if that's what you mean, no.

Q. You have no expertise, you have no experience, you don't know anything about the plaintiffs' asbestos bar, do you?

A. I think I know something. But I certainly don't claim to be an expert on who are the best asbestos lawyers in the plaintiffs' bar. It's something that one could find out, but I certainly don't' claim to have found it out.

Q. I'm not asking who are the best. I'm asking: Who are the ones that are willing to go out of

Testimony of John Leubsdorf, legal ethics expert Tr. 1953-1959

their experience in that case. I think there are dozens of firms in the country that would be very glad to undertake such a project. We're talking, remember, about a three percent fee on a total of more that one-and-a-half billion dollars. That is not a small reward that we're talking about.

Q. How many cases, Professor, can you -- I mean, all sorts of things are possible in this world. Could you tell the court of your knowledge how many Wall Street firms you're aware of have handled --

THE COURT: Counsel, this point has been milked until the udder is dry.

[Laughter]

MR. LOCKWOOD:

Q. On the pre-post-'59 issue, one question. If the court in reviewing -- let me back up.

Are you -- you're aware, are you not, that the provisions on how the funds of the trust will be paid out were not negotiated until after the trilateral was signed on October the 12th?

A. That's my understanding.

Q. So if the court were to determine that the trilateral agreement provided that the insurers' funds there could be used to pay equally pre-'59s and post-'59s, is it still your opinion that you needed two sets of lawyers, one representing pre-'59s and one representing post-'59s, during the period October 12th, 1993, to the date the global agreement was executed?

A. Yes. "Could" is just a possibility. You still have to decide whether that's actually going to happen. And that is part of the negotiation of the Ahearn settlement, not part of the trilateral.

Q. So -- so the pre-'59 lawyer then would say, "Well, even though the trilateral says that the insurance funds are going to get paid equally to everybody if there's not a global, since there's a possibility that the trilateral might not be approved, we have to have the global structured so that the pre-'59s get more than the post-'59s," is that your testimony?

A. No, you wouldn't have to say that. That's not my testimony. I never said that. He would have to say something like, "Well, historically, people in the group that I'm speaking for have gotten more, and they've gotten more because it was unclear that there was ever going to be any coverage, and that is part of the wonderful facts that have to be considered. We're considering not just the nature of the disease, but the forum, the law of the state in question, and part of the law of the state has traditionally been until two weeks ago that people who had post-1959 injuries were simply not going to be able to get as much money as others. That is an advantage which we're entitled to keep." Now, I'm not saying that I agree with that argument necessarily. There are arguments on both sides as to what would be the fair course of action. And you have to negotiate it out the way you negotiate out any other --

Q. Let me make sure I understand your last answer. Are you saying that it is your understanding that the pre-'59/post-'59 matter is a jurisdiction, is a matter of law in some jurisdictions?

A. Whether you have access to insurance coverage might be affected by state law.

Q. Well, the value of the pre- and post-'59 cases that you've been talking about that are referred to in this case are settlement values, are they not?

A. Yes.

Q. Not litigation values?

A. No. That's true.

Q. If a post-'59 case went to trial and a pre-'59 case went to trial, the verdicts were not going to be affected by the availability of insurance, were they?

A. No, that's true. But in order to collect the verdict, you have to have -- you know, you have to have a defendant against whom you can levy execution. And the law of the states, most states, as I understand it, was that in general the post-'59 claimants were only entitled to levy execution against the funds of Fibreboard, which were very limited. Of course, the post-'59 couldn't go directly against the insurance company, but there was a claim that they could ultimately have gotten that against CNA and Pacific, which would ultimately have led to their receiving more money for the same -- same dollar verdict than the post-'59 claimants would have gotten.

Q. And that was because of the insurance contracts which covered pre-'59 claims but not post-'59 claims. Right?

A. Right.

Q. Now, doesn't the October 12th trilateral legally modify and replace those insurance contracts if the court finds that that agreement says that the funds made available by the insurers can be paid equally to pre- and post-'59 claimants?

A. Yes.

Q. What do you mean --

A. And then you have to decide what you're going to do about it. Are you going to say, "Okay, things have changed now, but the old way was the way in which things would have occurred if there not been the settlement, and that's the way it should be

preserved? Or are you going to say, "No, now we have a new situation, and now we're going to treat everyone equally"? Those are two different situations.

Q. What's the argument in favor of ignoring the trilateral? Could you enunciate that for the court's benefit, please?

A. I've been trying to do that. The argument is that this is a part of a general settlement, it's designed to get people what they would have gotten more or less in the tort system, and that what people would have gotten in the tort system before this settlement included both the trilateral negotiated was greater in the pre-'59 payments than in the post-'59 payments, and we, the pre-'59 claimants, shouldn't be required to give up that prospect of full compensation for us as part of the settlement. If that's so, then we are getting off -- we're being treated worse than we would have been had there, for instance, been some -- some other result. And therefore the settlement should continue to ride in, perhaps not totally, but to some extent, maybe just a priority for the pre-'59 claimants, if there's enough money. There should be something to protect the advantage that we have traditionally and historically gotten.

Q. Okay. So your solution for making sure that that agreement is presented in the course of the negotiations would be to identify some lawyer and say "You have the sole responsibility of presenting that position on behalf of the pre-'59 claimants here"?

A. Correct.

Q. Is that correct?

A. Yeah.

Q. And then that person gets to negotiate with somebody representing the post-'59 claimants whose position is, "Under the trilateral, we get equal access to the insurance assets, we will never agree to your position." And how does that negotiation then get resolved?

A. Well, it gets resolved like most negotiations. The parties present their arguments, they make their threats, all of them want to reach an agreement for the benefit of their clients, eventually

some result is worked out, as I take it it was worked out in the Johns-Manville case --

Q. Supposing they reach an impasse. What would happen? They've got a billion-and-a-half dollar deal and they're at impasse on whether the pre-'59s should get better treatment than the post-'59s. Do they go to the court?

A. Well, there are various things they might do. They might resort to alternative dispute resolution, they might arbitrate, there are all sorts of ways in which you can resolve a negotiation. That happens all the time. Actually, it's always possible in any negotiations, but it won't work. That was possible with this negotiation, too.

Q. So if they went to the court --

THE COURT; Just a minute.

MR. BAUGHMAN: Your Honor, I think this is cumulative and this one question has expanded significantly since Mr. Lockwood's representation.

THE COURT: Mr. Lockwood, I appreciate the fact you're enjoying yourself --

[Laughter]

THE COURT: Have I not heard quite enough from this witness?

MR. LOCKWOOD: Let me check with my --

Testimony of John Leubsdorf, legal ethics expert Tr. 1973-1974

understanding that as far as you know, Mr. Kazan, Mr. Wartnick, Mr. Cox and Mr. Rice all have significant asbestos litigation experience, and Mr. Kazan and Mr. Wartnick particularly have what's apparently a specialized knowledge of Fibreboard Corporation. Do you believe it would have been approximate at the time that they were first asked to negotiate on behalf of future

claimants for them to act as consultants to other counsel who might negotiate on behalf of those claimants?

A. Yes.

Q. On August 11th, when this court -- 1993, when this court appointed as negotiating counsel those people who eventually became class counsel, in your opinion, would it have been appropriate instead for them to have appointed the Caplin & Drysdale lawyers as negotiating counsel?

A. That would have been one way of handling the situation.

Q. Would that have been better, in your opinion, than appointing those lawyers that did represent present claimants?

A. Well, it would have had the advantage that Caplin & Drysdale did not represent present claimants and at the same time they were extremely familiar with the negotiations. So I think it would have been, on the whole, superior as far as the conflict point is concerned.

Q. You had a little colloquy with the court regarding whether or not there was any taint with respect to the trilateral agreement caused by the conflicts of class counsel. Is it not your understanding that class counsel's involvement in the trilateral was limited to their demand that there would be in fact be a trilateral?

A. I haven't seen any reference to their participating in the negotiation sessions that led to the trilateral, but I haven't seen a lot about those negotiation sessions at all.

Q. Assuming that they did not participate in the negotiations beyond making the demand that they would not enter into a global settlement unless a trilateral was to be agreed upon by Fibreboard and continental, does that lead you back to your conclusion that there was no taint on the trilateral agreement?

A. It further supports my conclusion, yes.

Q. Prior to being contacted by me in connection with the Ahearn case, had any other party in this case contacted you with respect to the Ahearn matter?

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2002

could conceive a basis where I would not object and a basis where I would object.

THE COURT: Let me give you the opportunity to object after you've heard it. And the court will rule on it.

MR. INSELBUCH: Very well, Your Honor. Thank you.

MR. LIEBHAFSKY:

Q. Sir, do you have an opinion on the sufficiency of the global?

A. Yes, I do.

Q. What is your opinion?

A. I think it's highly likely that the amount of money available on the global agreement would be sufficient and indeed under any -- any plausible scenario of a great number that I've examined, I believe there will be sufficient amount of money.

Q. Certainly, sir, do you have an opinion one way or the other as to whether the global at the end of the day or the trilateral agreement will put more money into the pockets of asbestos victims?

MR. BARON: Same objection, Your Honor.

MR. INSELBUCH: I do not share that objection.

[Laughter]

MR. WACHTELL: Neither do I.

THE COURT: I give you both the right to lodge objections at the end. The court will accept them and either accept the testimony of this witness or not.

MR. BARON: I just want my objection on the record.

A. I believe I do have an opinion.

MR. LIEBHAFSKY:

Q. What is your opinion?

A. I believe again -- in fact, it's a fact, I don't believe, it's clear that under any circumstance more money would be provided

to the claimants under the global settlement than under the trilateral agreement.

Q. Now turning to how you got to your bottom lines, I'd like to take up first with you the topic of how you went about estimating the numbers and types of future claims that would be asserted, putting to one side for later discussion how you would price those claims. And let me just ask you first if you would explain to the court in a very general way how you went about your task in this respect.

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2035-2036

value 50 percent cash and 70 percent for the non -- for the credit part of it.

Q. Now, was there another pricing issue presented by the historical differentiation made between pre and post-'59 claims?

A. That was actually a more complicated issue, I think. Historically and apparently it's been described in this court, there were -- the availability of insurance for these claims differed in the amount of money that was paid in settlement of the claims, liquidated value settlements differed where the first exposure was before or after 1959. And so on the other hand, a lot of that differential was the result of the availability of insurance coverage for the pre-'59 cases but not for the post-'59 cases. So it was necessary to try and figure out what the post-'59 cases might get in the future once that differential was eliminated by the trilateral agreement.

Q. And did you do a regression analysis to look at that issue?

A. Yes, I did. Two things. First of all, I found that if you looked historically at the values of claims when they were filed, there was a steady decline. Excuse me. When first exposure was. Cases with first exposures in the earlier years holding constant what the disease was, analysis across all diseases, as you look at

it, over time cases with more recent exposures tend to get somewhat less value even before 1959. Then you got to 1959 historically, and they just dropped way off. Wasn't much different there. Low into the future. That suggested to me, and there were a number of independent reasons to believe that cases that had post-'59 exposures like Fibreboard probably had less value even once you removed this effect of the insurance coverage. And so what I did, I did a multiple regression analysis that's a statistical analysis that looked at how important elements of the pre-'59 claims were related to the size of those settlements, and I took the results of that analysis and applied it to the post-'59 cases.

Q. And is the bottom line that you haircut the post -'59 values 30 percent versus the pre-'59 values?

A. Yes. Both because the statistical analysis suggested that's the appropriate amount and also became of a number of factors that I think are different with post-'59 and pre-'59 cases.

Q. Now, was there another valuation issue presented by the so-called surge claims?

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2054-2055

I may be inclined to think the numbers would go up more under the trilateral, more likely to go up than they would under a comparable scenario under the global event, global settlement.

Q. There's a table in your report, the big exhibit, exhibit 34, that I would like you to turn to. I think it's table 39 on page 65.

A. Yes, I see it.

Q. Can you tell us what that table represents?

A. That's a table that includes the -- my best projection of what would be the values of these -- of the projected future claims, both the indemnity values and the cost to defend them. Obviously those numbers exceeded the amount of the trilateral agreement. But it's under the assumption that all these claims

were processed, that's what the total would run to, and that's assuming that the cost of defense would be a hundred percent of the indemnity cost. The defense cost would be equivalent to the indemnity cost.

Q. Now, we have in the documents here, if you'll look at exhibits 37 and 37A, I think we have presented an optimistic case for the trilateral and a pessimistic case. Would you look at those two exhibits and discuss them with us, please?

A. Exhibit 37, or table 48, compares -- starts with the total amount available under the global settlement and under what is probably the most optimistic value of the trilateral agreement net of the payments for present claims and including the value of Fibreboard Corporation, so that that would generate at most about $1.87 billion. And then it just reflects, as you go down, what percentage of the total corpus in each case would be expended on the cost of defending this litigation. The remainder is obviously available to pay claimants, of which a part goes to -- it gets deducted for the plaintiffs' lawyers and it ends up with a net of how much plaintiffs might be expected to receive under each of those two, and under table 40B under an alternative, less optimistic valuation of the trilateral.

Q. Are all the cities there that say "TR" to the transcript of the hearing in this matter?

A. Yes, they are.

Q. Look back at the graphics for a moment. That's exhibit 48. And please turn to E.

A. E in 48, yes, I have it.

Q. Is that in substance a graphical representation of the results of comparing your optimistic and pessimistic trilaterals versus the global as to how

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2313-2320

Q. Now, is that complete or is there anything missing on that?

A. I've since looked at the Fibreboard Pacific agreement, and there may have been one or two other documents, but I think this is complete, aside from the --

Q. Have you also had occasion to review Professor Leubsdorf's testimony that took place yesterday, the transcript of that testimony?

A. Yes, sir, I did.

Q. Now, in giving your opinions, do you rely on any particular body of authority or authorities?

A. Well, I know the Texas Rules of Professional Conduct, which are quite similar to the ABA rules, with certain modifications, but the modifications are, in my opinion, not significant in this case.

I'm familiar with the California law, which again is different fro the model rules, different from Texas, it has a unique history of its own. On the matters involved here, I don't think it's relevant -- there are any relevant differences.

I'm familiar with the rules that apply in most states because most of them are based on the model rules. And the same point holds, I don't think there are any differences of significance so far as the rules are concerned.

Q. In addition to the rules, are there any other body of authority that you rely on with respect to your opinion?

A. Well, I take account, first of all, of the common law on this subject, decision law interpreting those norms, practice norms, that is, how lawyers commonly interpret what those rules are. I should say responsible lawyers interpret them. And literature on the field. I've read extensively. I think I'm fully conversant with broadly the literature on conflict of interest.

Q. Let me turn specifically to the model rules. Model Rule 1.27, are you familiar with that, sir?

A. Yes, sir.

Q. Now, that has two subparts to it, does it not, A&B?

A. Yes.

Q. As the basis of your opinion, do you view one or the other of those as more significant to the issues we will be discussing here today?

A. I think 1.7(b) is the one that governs the responsibility of the lawyers in question here.

Q. You also are aware of model Rule 1.8(g)?

A. I am.

Q. And how does that, if at all, relate to the opinions you'll be giving here today?

A. That rule implicitly recognizes the propriety of the lawyer representing more than one client or indeed multiple clients who are claimants in a proceeding, it requires that -- apart from the responsibilities in 1.7, it requires that the clients so represented to be informed about a settlement and the terms of the settlement when a single settlement resolves the claims of all those claimants. That is a -- it's an additional requirement about disclosure and consent beyond what might be required by 1.7(b).

Q. All right. Now, as a result of the work that you've done in this area and the documents you've reviewed, have you formed an opinion concerning the conduct of class counsel throughout the period of time in question?

A. Yes, I have.

Q. What I'd like you to do, sir, is break that opinion down somewhat chronologically through different periods of time. First I'd like you to focus on the period of time when sometime around the beginning of 1991, when I believe the record indicates that some discussions on what was called a global settlement began between representatives of Fiberboard and some of these class counsel or people who become subsequently known as class counsel, and at the end of that process, April 1993, which is the

point in time when CNA as one of Fibreboard' insurance carriers came onto the scene and signed an agreement with Fibreboard to proceed. During that period of time, have you formed an opinion as to whether anything that any of the class counsel did or people that subsequently became known as class counsel did during that period violated any ethics rules?

A. I have an opinion.

Q. And what is that opinion?

A. I don't think there was any violation at all.

Q. Could you state your reason for that?

A. At that point, the discussions, as I read them, were exploratory, qualified, intermittent, episodic, uncertain in their foundations, they were looking at the possibility, perhaps, of a global settlement, not well defined, but an idea of such a settlement. There was, therefore, no identified class at that time; there was no set of people that definitely were in a class. I don't think there was in any proper sense of the word a client that these people, the lawyers, were representing. I think they were considering the interests of those people, but I do not think that they had anything approaching a representational relationship to them. That's No. 1. So there wasn't a client, in my opinion; therefore, there couldn't have been a relationship giving rise to conflict of interest.

Second, as I reviewed the record, I don't see that they did anything that was in any way adverse or constrained so far as the interests of those people were concerned. Nothing that they did was adverse to their interests, nor could I see that it was impaired by their, at that point, continuing responsibilities to members of the present -- what are now called the presents, which were simply various people that were represented by the law firms of Ness Motley and eventually Casein and Wartnick.

Q. Now, you referred before to 1.7(b) being the operative provision of the code that would deal with this area; is that correct?

A. Yes.

Q. Now, that provision talks about situations where there may be a material limitation on the representation because of responsibility to another client? Do you recall that?

A. Yes. Or on account of the lawyer's own interest, yes.

Q. In either case, you do not see any violation of that rule during that period of time; is that correct?

A. No, I don't think they had a client, and I don't think that there was anything about that set of people for whom they were expressing concern or thinking about the possibility of doing something, there was anything that constrained what they might do on their behalf. So had they been regarded as a client, I think there was, in any event, no conflict of interest.

Q. Let me move forward to the next chronological period of time from April 1993, when CNA insurance company entered into its agreement with Fibreboard and came onto the negotiating scene, and August, or just before the time on August 9th, 1993, when this court appointed the four individuals, Messrs. Cox, Rice, Casein and Wartnick, as class counsel. During that period of time, do you see that anything or any activity by any of those four gentlemen in any way violated any ethics rules?

A. In my opinion, it did not. In my opinion, it was in conformity with ethical requirements.

Q. Is there anything -- during that period of time, is there anything different going on that would in any way impact on any of these issues?

A. In that period, Judge Higginbotham, acting as an appointee of the court to facilitate the possibility of settlement, was on the scene. That focused the discussions in a way that they had not been before. The documentation and the testimony indicates that a more -- how shall we say? -- sharper definition of a possible class was emerging, there was a discussion of having a class to include both the presents and the futures or, as an alternative, perhaps only the futures. Given that kind of focus, even though there was not yet a client, because there wasn't a class, I think that the lawyers assumed a responsibility for the interests of those folks

that I would characterize as a fiduciary responsibility, one might call it an incipient representation, if you wanted to. I think that they felt -- the indications are they considered themselves speaking for those people in a qualified and conditional way, to be sure; but speaking for their interests and considering them as such, it seems to me that they were not constrained in the assertions, position-taking that they could do for those folks. So I conclude first that there were not, strictly speaking, clients; secondly, that the futures were at that point people protected by something in the way of a fiduciary duty; and third, that the duty that was owed could be defined in the same terms of -- of loyalty and -- and unconflictedness of purpose that a lawyer would owe to a client. And judged by that standard, fourthly, in my opinion, they observed those standards.

Q. Do you see that there was any conflict or any difference of interests between the fiduciary obligations you just described that these four individuals had to this incipient group of people, the futures, however it was to be defined, and their present or any of their present clients who they may have been representing in the tort system with respect to asbestos claims against Fibreboard?

A. No. I think that if you put the case most strongly concerning the relationship it would be to look at those folks as already becoming clients, though I don't think they had, but it's -- assume that they were. Then you have a situation of a lawyer representing some people who have claims that have not yet been asserted, and he is representing them vis-a-vis the same set of potential obligors; namely,

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2321-2331

Continental, Pacific and Fibreboard. And as I understand the law and settled practice, a plaintiffs' lawyer may represent more than one person against a defendant or a set of defendants without there being any conflict of interest arising from that fact. That seems to me to be essentially what the situation was. There's no indication that they did anything incompatible with the interests of the futures or for that matter the interests of the presents, and therefore it seems to me that judged by the most exacting standard you could apply in that interval that their conduct conformed to the standards of professional ethics.

Q. Now, in forming that opinion, did you take into account the coverage litigation that was going on in California between the insurance carriers and Fibreboard? And if so, did that in any way impact on your opinion?

A. In this, yes, I did take account of it. The fact of the coverage litigation was a -- a severe risk to the presents and to the present -- and to the futures alike, because if the California litigation had an end result adverse to the coverage, then the amount available to pay anybody was limited to the assets of Fibreboard. Maybe there had been -- there would have been a partial victory in the -- in the California litigation, but it could have resulted -- there was a very severe risk in total loss or a radical reduction in insurance coverage being upheld by the California courts. Fibreboard had an asset value that is in the order of magnitude of 215-250 million. Obviously, there are other property interests and claims against that; but even assuming that those resources were fully available, they were dwarfed by the claims of the presents and by the claims of the futures and dwarfed by the combination of them. So that the loss of the insurance coverage in California, loss of the insurance case would have been nothing less than catastrophic from the point of view of the plaintiff claimants. It also would have been, of course, catastrophic to Fibreboard. So that is

a realization that was always present. However, the California appellate court had signaled, as I understand it, that it was moving into fear for final deliberations, and therefore that menace was now coming on the immediate horizon instead of being a more distant prospect. And I think that that was a consideration that a lawyer for the present was required to take into account, and I think it was a consideration that someone endeavoring to act for the futures, as I interpret these lawyers then to have been doing, was similarly required to take into account, and it was a very strong impetus or incentive to see whether a suitable arrangement might be worked out by negotiations.

Q. I take it, sir, that the risk that you've been describing basically is a risk that all of these claimants who might have had claims against Fibreboard would have had that their claims might have been substantially impaired as they go forward, assuming the coverage case came out a certain way.

A. If the coverage case went against Fibreboard, it would cut off the insurance for -- liability insurance coverage available for the presents, for the futures, for all time, for everybody.

Q. Were you ware, sir, that there was also litigation going on between CNA and Fibreboard with respect to the validity of certain assignments of insurance policy benefits that had been made previously as part of settlement entered into with the claimants?

A. Yes, the claim essentially by Continental was that the Fibreboard arrangement, stratagem, call it what you will, constituted a breach of its duty of cooperation which would have the effect of nullifying any coverage that might be upheld in what we call the coverage litigation then pending in the California appellate courts.

Q. And again with that litigation in mind, were all of these claimants again facing a further risk of substantial impairment?

A. Obviously if Continental were able to make that claim stick, it obviously was a disputable claim. But then Continental would be out of the picture and Fibreboard would be reduced to looking to Pacific, the coverage of which was substantially less.

Q. Towards the end of the time period we're talking about, April 1993 to August 9, 1993, just before the appointment of class counsel, another event took place, the renegotiation of the Ness Motley agreement, whereby CNA, Fibreboard and the Ness Motley claimants entered into what became known as Ness Motley 2. Does that in any way figure into your opinions?

A. I'm aware of it. It had the effect, with some qualifications, of setting the so-called presents case. It had, however, provision that some of the benefits to be paid were conditioned upon there being in place a trilateral and then the global, which were so-called triggers, as I understand the arrangement, for those payments. Now, I am quite aware of that relationship. One could say that the resolution of those claims transformed -- in Ness Motley 2 transformed the so-called presents into past clients. I happen to think that that's an improper categorization, but it is one that could plausibly be maintained. If one viewed it that way, then the present clients became past clients and the question would be: Is anything involved in representation of the future claimants inconsistent with the interests of the past clients? And my answer to that would be no. The situation there is as though a plaintiffs' lawyer represented someone with a claim against, say, take a hotel fire, for example, claim 1, settles that, is the lawyer disqualified, in virtue of that, from taking on claim 2 arising out of the same general set of -- set of circumstances? I take it it's clear that at least in the absence of circumstances not present here that there's no prohibition on that. Now, another way to look at it is --

THE COURT: Your opinion would be -- is that equatable to lawyer with claim 1 settling claimant 1's case conditioned upon the hotel settling with everybody else and then starts negotiating for claimant 2?

THE WITNESS: I was going to come to that. The first one I was saying is: Are we talking about assume there's no condition? The situation would be you're representing claimant 1, seal that one off, start the next one. You're representing claimant

No. 2 out of the same transaction. Is there any conflict there? My answer is no. It's done all the time.

Next question is: Well, assume that there is something built into the settlement of No. 1 that relates to the disposition of No. 2. And one could imagine various situations in which there might be a conflict resulting from that nexus.

The question is: Does the connection that's involved here create any such incentive on the part of the Ness Motley folks, having settled on this conditional -- in this conditional way the claim in behalf of the presents, is there anything about that claim, that resolution, that impairs their ability to represent the futures adequately?

Now, in my opinion, as I understand what Ness motley 2 said, was that if there were a court-approved global, meaning a settlement of the futures claim, which means a claim -- a settlement that is fair, reasonable and adequate for these future folks, that would engage, kick in, trigger the cash benefits that were a conditional part of Ness Motley 2.

Now, that's an oversimplification of exactly what it is, but the resultant of that is that there is an incentive vis-a-vis the presents to get an appropriate settlement in the futures, so that the interests are synergistic or compatible and not hostile.

An correlatively, there's no drag on the representation of the futures in virtue of this. Indeed, you might say that there was an incentive to the lawyers if they could get a fair and reasonable settlement. The futures, because it would then mean that they were going to get a cash enhancement of the prior settlement, so that they had an incentive in either event to -- to do well for the futures class.

That's the way I understand the structure. And therefore the interests were, as I say, synergistic rather than being inhibitory or constraining.

Q. When you say "synergistic," you mean the interests of th Ness Motley claimants in getting the back-end or the second 50 percent of the settlement through, which would be dependent

upon the global being done and receiving court approval, and the futures getting a settlement done which would receive court approval? Is that what you mean?

A. I mean that they were reinforcing, yes.

Q. In considering the context of the Ness Motley 2 agreements requirement that a global or any of these other triggers -- I think there was another trigger for trilateral -- required court approval, about the global, do you have any understanding that that was calling for a class action type of mechanism?

A. I think that's the only way you could imagine settling the global. And it's clear from Mr. Wachtell's stated position at an earlier point in the negotiation that some such arrangement was necessary from the point of view of Continental inasmuch as we had no enumeration or list or census of all the claimants, inasmuch as the position of the defendants was: We'll consider these discussions if we're looking to total peace. That necessarily means peace vis-a-vis people who are not presently enumerated. And that means you're talking about a class. So -- and that means you're talking about Rule 23. And that means, therefore, in a sense this is a kind of a compression of what the discussion is, that you're going to have a hearing before a court, as we now are, in which the whole process is scrutinized and the fairness of the settlement is subject to judicial review.

Q. As well as the adequacy of representation? Is that subject to review as well?

A. That's a part of the review required under Rule 23.

Q. Let me move forward to the next chronological period of time from August 9th, 1993 to August 27th, 1993, that date being the date the record will reflect -- will you get Professor Hazard some water, please -- that being the date that the California court had scheduled final arguments in the coverage case. Let me stay first with the appointment by this court of the four individuals as class counsel on August 9th, just stay with that for a moment. Do you have any view as to whether or not there was anything improper in these four individuals accepting that appointment?

A. No, I think it was entirely proper. Ness Motley is a very well-known, very experienced, very competent, aggressive law firm that's long been in asbestos litigation.

Thank you very much, Miss.

Casein and Wartnick have had long experience in the prosecution of claims, particularly against Fibreboard. I happen to be a member of the California Bar, and I know Mr. Wartnick's firm from a long time ago, and I know about Mr. Kazan, and they're certainly well-respected lawyers.

I think it was very important to -- I disagree entirely with Professor Leubsdorf on this point. I think it was very important to have people who had established competence and standing in asbestos litigation. I won't reiterate the elements of experience, knowledge, background. This is an extremely complex subject that takes intensive engagement to -- to understand and appreciate. I think those folks did so -- I think you have a problem of visibility. This is a public event, not just private litigation. And in my opinion, these lawyers enjoyed standing among their peers, they enjoyed standing among, for example, the labor organizations with whom many of the working folk were associated, so that they were people in whom relevant constituencies would have reason to have confidence. And that radiates on its effect on the futures clients.

Or, to put it differently, if you picked somebody who didn't have that kind of background, I think that it would have been an invitation for bitter sort of criticism and -- and jeopardizing any effort at serious negotiation.

Q. Now, this third chronological period, August 9th through August 27th, was a very short period of time, 18 years.

A. Yes.

Q. Does that factor in any way impact on any of your opinions here?

A. I will say that I think it was somewhat surprising that the people could, as it were, get their acts together in that short time.

On the other hand, the people who were participant in this were, with the exception of the Wachtell firm, long-term players in this. The Wachtell firm had been an active participant now for six months. I can tell you from my own observation that that's an extremely competent firm who had great experience in class suits, in complex transactions, so that in terms of that aspect of it they brought something to the party that was of comparable professional standing.

So here you have on this day, with the -- with the fate of the California litigation

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2334-2336

on August 27th, 1993?

A. August 26 and 27th, as I understand, the folks met at the courthouse and they were invited out to the judge's house. They met together, they met separately, they deliberated and they converged. And in my observation of law practice in various settings, that's typical of the way settlements finally happen. The judge was trying to exercise a benign influence on them; but as I understand it, this was direct negotiations and they moved around. I think the defendants came up with some more money beyond what they've had already come up with, and finally people say, "Yeah, okay." And that's a magic moment in settlement. You never know quite when it's going to come.

QQ. Now, Professor Hazard, you saw in both the depositions as well as the testimony yesterday of Professor Leubsdorf that he took a position that there was a conflict of interest between the interests of what he referred to as the Ness Motley back-end claimant situation, i.e., the need to get some sort of a trigger to get the back-end going, and the interests of the futures. And I think he framed it in terms of, one, the back-end Ness Motley simply wanted some deal done, they didn't care what it would be, just as

long as it was done, and the futures would want, in his view, the very best deal that could be done. Now, do you see any conflict there or any differing of interests that would create any conflict?

A. No. I don't know why it wasn't consistent with the interests of the futures class to get the best deal you could get, whatever that is. I mean, it assumes that you can define that apart from the process itself, which I think is just fantasy. The best deal is what seriously-intended, competent people can get. And you can always second-guess a deal to say, "Well, you could have gotten more." Well, yeah, maybe you could, and maybe you could have gotten a lot less, too. So I think the notion of a best deal is aspirational rather than definitional.

Now, on the other side, the -- the -- the presents have in mind that the deal has got to pass muster. And I think that it's too easy to trivialize what it takes to pass muster. And I think it's too easy to trivialize the serious concern of the plaintiffs' lawyers. These were people who had deep attachments not only to specific individuals as their clients but to a sense of cause. They're concerned for these folks. And so you have to say that these guys were suddenly going to be patsies or relax or go limp or something or other, on the one hand, and that they were oblivious to the fact that they were going to have to stand up here in court and justify their conduct. So I think that both on, if we can say, financial economic interests and psychological grounds as well as just considerations of elementary responsibility that the concerns -- the interests of the two groups were essentially reinforcing.

Q. So am I correct, sir, that through, let's say, August 27th, the third of the three time periods we've discussed so far, you do not see anything where any of the conduct of any of these four individuals violated any ethical rules? Is that correct?

A. I do not. I think they -- I think every indication is that they were doing the best for now their clients the futures in the circumstances which were severely constrained by the circumstances I've described, particularly the California litigation.

Q. Is it relevant to you -- and you referred to this, so maybe it is -- the fact that at the last moment, on August 27th, these four individuals in discharging their obligations were able to get a little bit more money onto the table, another —

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2374-2376

until you start working.

Q. All right. Well, let's turn to tab No. 10, if you would, please, sir.

A. All right.

Q. Tab 10 is a letter dated November the 25th of 1991, it's on the letterhead of Caplin & Drysdale, it's from Mr. Inselbuch, and it's addressed to Mr. Snyder, and attached to it is what unfortunately is smudged out here, but it's entitled Term Sheet, and it talks about the settlement classes, the amount of money to be paid for each class of settlement and various other aspects of the proposed settlement with -- for a class of future claimants. At that time, August -- November the 25th of 1991, was there an attorney-client relationship between these lawyers who are now class counsel and a class of future claimants?

A. No.

MR. BSCHORR: Objection.

MR. WACHTELL: Your Honor, to the extent that the question presumes that it referred to a class of future claimants as distinct from both presents and futures, I think it is inaccurate based on the document itself.

THE COURT: Was your question restricted to futures?

MR. BARON: Well, futures are certainly being settled by this letter. And, yes, it was restricted to futures.

THE COURT: Go ahead.

A. Wait a minute. They aren't being settled. This is a proposal to talk about the terms. Okay?

MR. BARON:

Q. Okay.

A. Of course at this time they has present clients, if that's the question.

Q. But that's not the question. The question is: Did they have future clients?

A. No.

Q. So when you're saying, then, it was okay as far as you're concerned for these lawyers to make a settlement offer to settle for a group of individuals that they did not yet present?

A. That's what you have to do when you're exploring a possibility of a futures class.

Q. All right. So when you explore the possibility of a futures class, you can make settlement demands and still not yet have a fiduciary responsibility for the class?

A. I didn't say that. That's a distortion of what I said. I said they had a fiduciary responsibility.

Q. I'm sorry. I misunderstood you. So there, then, was a fiduciary responsibility that was now extant on November the 25th of 1991?

A. I think that's a fair statement, yes.

Q. All right. And can you describe for me what the nature of that fiduciary responsibility was?

A. To serve faithfully without conflict of interest and competently and with -- with reasonable energy.

Q. Okay. So they had those obligations, you believe, at least by November the 25th of 1991?

A. Yes. There's very great difficulty in visualizing this is a complete relationship. I'm quite uncertain about the beneficiaries and so on. With that said -- and it's also difficult to figure out what would constitute conduct constituting a breach. With those ambiguities in mind, I think there was a fiduciary duty.

Q. Now, do you believe that on November 25th of 1991, these lawyers, class counsel, had reason to believe that there may

not be enough money to go around for both the present claimants and the future claimants?

A. I don't know the answer to that question.

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2382-2385

A. Some large sum.

Q. And that $200 million or so came from, in part, what might otherwise be considered coverage of Fibreboard?

MR. LOCKWOOD: Objection, Your Honor. The hypothetical had to do with what happened to the futures since the coverage case was lost and which by definition had not occurred at the time of Ness Motley. This is a totally incomprehensible line of questioning.

THE COURT: Well, I've suffered through other incomprehensible lines of questioning, and I'll give counsel latitude here.

[Laughter]

MR. BARON:

Professor Hazard, would it be fair to say that every time that Ness Motley settled a case for their present clients after November 25th, 1991, they were potentially taking money out of the pockets of future clients?

A. In the way which you have described that, there's a way which that could be true, yes.

Q. Okay. And wouldn't that then mean that there was a conflict between those two groups?

A. No.

Q. In competition for funds?

A. No.

Q. So even though by settling present claims for present claimants, Ness Motley was depleting the available assets of Fibreboard while they were simultaneously --

A. That's a false statement. They weren't depleting the assets of Fibreboard, they were availing themselves of money that the insurance companies were willing to part with pending the litigation of the coverage case.

Q. Right. And that was not, in your opinion, an asset of Fibreboard, the coverage that was there?

A. It was a contact claim, but it was one that was in litigation.

Q. Well, did you assume at any point in time for purposes of your analysis here that there was a certain price beyond which Continental would never pay to resolve the entire matter?

A. Sure.

Q. So there was a reserve price as such?

A. Everybody has a reserve price.

Q. And in the completion for the use of that price, would you agree with me that presents were competing with futures?

A. In that sense, it's true. That is, if you -- if the reserve price was such that there was some possibility that the money would not be available to pay all the claimants, then there was that risk.

Q. Okay. Now, I asked you whether there was --

THE COURT: Just a minute. So do I follow your answer to be that whether or no there's a potential ethical violation depends on the reasonableness and fairness of the amount negotiated?

THE WITNESS: Absolutely.

MR. BARON:

Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?

A. It depends -- I think the judge said -- I think I heard him to say the circumstances. That is, the conflict of interest is a real-

world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about -- how shall we say? -- the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2388

THE COURT: I t appears to me it's beyond the -- certainly beyond the reason the witness is here, but tell me what you're after, counsel.

MR. BARON: Your Honor, I want to know if this witness believes that there was a time during the negotiations where it was believed by counsel that there would not be enough money to go around and that they just had to take what was there based on the review of this.

THE COURT: Go ahead.

A. I didn't see any indication that plaintiffs' counsel through that they could not get sufficient money to handle the claims of the presents and the futures.

MR. BARON: Okay.

Q. So, it's your view and you base your opinions on the fact that counsel in this believed throughout that they would settle only if they got a hundred cents on the dollar for what they thought was a fair settlement for their presents and for their futures?

A. I regard that question is incompetent, frankly, Mr. Baron. A hundred cents on the dollar means one thing, fair means something else in this context.

Q. All right. Well when a lawyer represents a

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2389-2390

client, a lawyer has a duty to evaluate the client's case and to attempt to get a fair value for the client?

A. Indeed.

Q. And that's true if you've got one client or if you've got a thousand clients?

A. That's right.

Q. And the lawyer's duty changes, does it not, if it turns out that the defendant is not going to be able to have enough money to pay what is a fair settlement?

A. No.

Q. If there's multiple claimants.

A. The lawyer's duty is the same. The reality is different.

Q. Okay. Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?

A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it were for practical purposes without limit, that is, they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.

Q. So there was no artificial limit on the amount that the insurance companies could pay to settle this case, is that right?

A. That's right. But there was a pending matter that would result in there being no insurance money.

MR. BARON: I understand that.

THE COURT: How much longer do you expect?

MR. BARON: Just a few, Your Honor. Getting close. Unless the court wants to take a break. I've probably got 10 minutes.

THE COURT: Go ahead.

MR. BARON:

Q. Professor Hazard, you have not formed an opinion on whether the court should approve this settlement, have you, sir?

A. That's outside the scope of my responsibility.

Q. Right.

A. Professor Hazard, the proceeding here to attempt to resolve these questions is not analogous, is it, to an in rem proceeding in terms of

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2396-2397

Q. What would be the circumstances?

A. Is the settlement value was out of the range, if there were other agreements between counsel that created an adverse incentive on the part of counsel, those are circumstances. There weren't any of those here.

Q. Well, if it was out of the range, it wouldn't be within the range, which is what the hypothetical assumed, that it was in the lower range as opposed to the higher range.

A. You're presupposing that we can state in the beginning a definite lower range boundary. That's an idea. Here we happen to have some pretty good idea, because you've got a substantial history. But I don't know how you could write down the lower end of the range of reasonable settlement if $3,433. That's just an idea.

Q. Right. And do you subscribe to Professor Leubsdorf's view that's one of the reasons why we have the conflict rules, that if there is a possible conflict there that counsel needs to be disqualified, because you could never go back and figure out whether it was a good deal, bad deal or otherwise?

A. I agree with what Professor Leubsdorf said in that respect; I don't agree with that summary of it.

[Laughter]

Q. Do you agree with this statement? "A settlement class suit is a proceeding brought after negotiations have been concluded between plaintiffs' representatives and the defense in which the purpose and effect of the suit is not litigation but a binding judicially-approved contract that will govern all future cases"?

A. Yes.

Q. You wrote it, didn't you?

A. It sounded awfully good to me.

[Laughter]

MR. BARON:

Q. Do you believe that this case, as you've reviewed it and spent all the time that you have spent on it, has for its purpose not litigation but a binding judicially-approved contract that will govern all future cases?

MR. LOCKWOOD: Objection, Your Honor. This witness has not been called to testify on that subject.

A. The answer is sure. What else are we doing here?

MR. BARON: That's all I have, Your Honor.

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2399-2400

question of whether you would need to have separate subclasses and the global was then going to be negotiated?

A. I think that if it was within the range that plaintiffs' counsel could reasonably negotiate, it might have been an occasion for asking for subclasses, but I think that would have been a mistake.

Q. And the fact that the $2 billion would be made available without differentiation in the trilateral would be a relevant factor in that consideration?

A. I think it fulfills a fundamental principle of fairness counsel could take into account. The class pre and post would take it into account.

Q. I have one other question. And this goes to your concept of reserve price and economic model and the like. Directing your attention to where the insurance companies stood on August 26th of 1993, where the Ness Motley 2 was a matter of history and already had been done, would you agree that at that point, still facing the risk of loss in connection with the coverage litigation, that they essentially had to appraise independently in deciding what they were willing to pay to settle the futures class, what they were willing to pay on the one hand as against the consequences of not entering into that agreement on the other?

A. Sure. They had already entered into one agreement. The question is: Should we put some more money on the table to get further peace?

Q. And no matter what their druthers might have been as to an overall price, they had to make a new economic decision of what made sense with respect to this outstanding liability; is that correct?

A. It's a different claim. Absolutely.

MR. WACHTELL: No further questions, Your Honor.

THE COURT: We have Mr. Sweeney left this afternoon. Who else this afternoon?

MR. BARON: Housekeeping, Your Honor.

MR. MILLER: Your Honor, we will probably have some rebuttal testimony, I suppose, we might call it, from Mr. Snyder, very briefly, and, of course, we will have Mr. Vasquez tomorrow morning.

MR. KRISPIN: Your Honor is aware of our intent to call -- recall Mr. Snyder. And I believe --

THE COURT: That's in Rudd, counsel. As I understood it.

MR. KRISPIN: Well, there is one very

Testimony of Stephen Snyder, Fibreboard counsel Tr. 2699-2703

That's all I have.

THE COURT: When we come back, you have two questions?

MR. BARON: Well, Your Honor, two or three. He did raise two or three questions.

THE COURT: All right, Mr. Baron. Let's get it over with.

MR. BARON: I'll do it as quickly as I can, Your Honor.

CROSS EXAMINATION BY MR. BARON

Q. Mr. Snyder, I wanted to follow up on an answer that I think was cut off in midstream. You've testified that victims under the trilateral might well receive less money from Fibreboard but that did not mean necessarily that they would receive totally less money.

A. That's correct.

Q. And could you explain what you meant by that? I don't believe it's clear in the record.

A. Talking about an individual case or gross basis? On an individual case, if Fibreboard is in a jurisdiction where it's a minor player, historically the plaintiffs' lawyers know how to get adequate compensation for their clients from the existing stable of defendants. And I'm assuming that that won't change, although if bankruptcies occur the total number may go down. Fibreboard will pay its share in its home jurisdictions, it just wants to pay a fair diminished share in other jurisdictions. So on an individual claimant basis, I would assume that the claimants are going to get the same amount of money for their clients. On a gross basis, it's very clear that if Fibreboard is able to convince the plaintiffs' lawyers that it's acting responsibly and that it does want to spend money on claims rather than defense costs, that it can bring more money into the system for claims, even though the individual case averages might be lower.

Q. But, Mr. Snider, you would agree, would you not, that if the global is disapproved and the trilateral goes into effect, that in terms of the amount of money each victim will receive in the total category of his asbestos claim, it really wont change any?

A. I don't believe it will.

Q. All right. Now, Dr. Peterson testified that the trilateral funds would run out within seven to nine years. And again you started to respond to that. What's your belief about the likelihood of that occurring?

THE COURT: He stated it wasn't going to happen. He stated he disagreed with it.

A. Even if Fibreboard misbehaves and miscalculates in the tort system, it can husband and conserve and keep those funds for longer than seven to nine years. If Fibreboard can even get close to the five to six thousand dollar case average that I'm talking about, and that we're already pretty close to in 1994, we're talking about two decades, three decades, a long time.

MR. BARON:

Q. Okay. Now, there was discussion of Owens-Illinois, and you brought up this chart that was shown to us that Owens-Illinois over the last two years has disposed of about 70,000 claims. Do you know how much Owens-Illinois spends each year on defense costs?

A. No, I don't.

Q. There were documents that were placed in evidence earlier showing that OCF spent in the range of 55 to 60 million dollars per year over the last two years. Do you know of any defendant in the asbestos litigation that spends more money than that per year defending asbestos claims?

MR. WACHTELL: Objection to form. That was as to outside counsel costs.

MR. BARON: Right, as to outside counsel costs.

MR. INSELBUCH: And uninsured. Also referred to uninsured costs.

MR. BARON: No, it did not.

THE COURT: Can you answer the question?

A. Some of the claims facilities -- no. I don't know of any other thing. The answer is no.

MR. BARON:

Q. Is that the high end of the spectrum?

A. I don't think it's the high end of the spectrum, no.

Q. Do you know of anyone that's higher than that?

A. I don't know of anybody that's spending -- that spent more than 55,000 dollars on their defense in the year that OCF spent $55,000 on their defense.

Q. I think you mean million.

A. 55 million, yes. I know of defendants, including OCF, that have spent a lot more in years when they were really in distress or they felt they were in distress and were vigorously defending cases.

Q. And "in distress" means no funds or inadequate funds to settle claims?

A. No. It means going through a difficult transition, which is what Fibreboard will go through, I think, if it ends up with the trilateral funds, as it did when it came out of the asbestos claims facility. Remember, Fibreboard only 50 to 60 million dollars. But that was part of a program where it was only spending about 20 to 24 on indemnity. It was two to one at that point.

THE COURT: Gentlemen, I've heard enough. When we come back, we'll take care of the housekeeping matters, and then the court's interested in hearing the report from the guardian.

[Lunch recess]

THE COURT: On some of the continuing matters, the court sustains the objection to the tender of the Kane transcript. The court is inclined to grant the motion for intervention under Rule 24(b) filed by the